

12 JUNE 1947

I N D E X
of
EXHIBITS

<u>Doc. No.</u>	<u>Def. No.</u>	<u>Pros. No.</u>	<u>Description</u>	<u>For Ident.</u>	<u>In Evidence</u>
1313	2722		Telegram from Weizsacker, German Vice-Foreign Minister to Ambassador Ott in Tokyo, dated 21 June 1939		24178
1632	2723		Memorandum signed by Woermann, Director of the Political Department of the German Foreign Office, dated 20 July 1939		24179
1633	2724		Telegram sent by Weizsacker to Schulenberg, German Ambassador in Moscow, dated 22 July 1939		24185
704	2725		The Non-Aggression Pact Between Germany and the Union of USSR concluded 23 August 1939		24187
1634	2726		Telegram from Mackensen, German Ambassador in Rome to the German Foreign Office, dated 23 August 1939		24190
1529	2727		Excerpt from "Peace and War" published by the U. S. State Department, which is a Memorandum signed by Hull re a Conversation with the Japanese Ambassador HORINOUCI		24195

12 JUNE 1947

I N D E X
Of
EXHIBITS
(cont'd)

<u>Doc. No.</u>	<u>Def. No.</u>	<u>Pros. No.</u>	<u>Description</u>	<u>For Ident.</u>	<u>In Evidence</u>
710	2728		Statement of Premier HIRANUMA showing that the HIRANUMA Cabinet resigned as a result of the German-Russian Treaty (previously marked for identification only, transcript page 17,836)		24202
246	2729		Statement of the ABE Cabinet dated 4 September 1939 show- ing that the Japan- ese Government made clear that it had abandoned the pro- Axis Policy		24206
			<u>MORNING RECESS</u>		24207
1400-D-3	2730		Excerpt from "Foreign Relations of the U. S.", which is a telegram of Ambassador Grew to Secretary of State dated 18 December, 1939 re Conversation Between Ambassador Grew and Foreign Minister NOMURA on that date		24209

12 JUNE 1947

I N D E X

Of

EXHIBITS

(cont'd)

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1400-C-3	2731		Excerpt from "Foreign Relations of the U. S., Japan 1931-1941" which is a telegram from Grew to Hull dated 20 December 1939		24213
1631	2732		The 4th Conversation in Tokyo Concerning the Question of Concluding a New Treaty of Commerce Between NOMURA and Grew, dated 22 December 1939		24216
1636	2733		Telegram from Ambassador Mackensen in Rome to the German Foreign Office, dated 27 May 1940		24227
			<u>NOON RECESS</u>		24237
155	2734		Message of the Prime Minister Prince KONOYE, dated 27 September 1940 - excerpt from prosecution document 777-A		24276

12 JUNE 1947

I N D E X
Of
WITNESSES

<u>Defense' Witnesses</u>	<u>Page</u>
SAITO, Ryoei	24239
Direct by Mr. Cunningham	24239
(Witness excused)	24252
AFTERNOON RECESS	24259

Thursday, 12 June 1947

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Court House of the Tribunal
War Ministry Building
Tokyo, Japan

The Tribunal met, pursuant to adjournment,
at 0930.

Appearances:

For the Tribunal, all Members sitting, with
the exception of: HONORABLE JUSTICE E. H. NORTHCROFT,
Member from the Dominion of New Zealand, not sitting
from 0930 to 1600; HONORABLE JUSTICE JU-AO MEI,
Member from the Republic of China, not sitting from
1330 to 1600.

For the Prosecution Section, same as before.

For the Defense Section, same as before.

(English to Japanese and Japanese
to English interpretation was made by the
Language Section, IMTFE.)

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1 MARSHAL OF THE COURT: The International
Tribunal for the Far East is now in session.

2 THE PRESIDENT: Mr. Blewett.

3 MR. BLEWETT: Mr. President and Members of
4 the Tribunal, the next stage in these proceedings is
5 what the defense terms generally "the Pacific War."
6 The evidence will be quite comprehensive. The open-
7 ing statement is under revision, outlining the theory
8 of the defense, and it will be read by Japanese coun-
9 sel. We request the permission of the Tribunal to
10 defer its delivery until after the recess, where it
11 will be more helpful to the court.

12 At this time, all the evidence is available
13 in one sub-division of the Pacific phase, which has
14 been carefully prepared. We ask the indulgence of
15 the Tribunal for permission to present the proof re-
16 garding the Tri-Partite Pact now. No other evidence
17 to come will conflict with it or be repetitive.

18 I present Mr. Cunningham, who is the chair-
19 man of that sub-division.

20 THE PRESIDENT: How long will that take?

21 MR. BLEWETT: We expect, sir, that it will
22 take up to the 23rd. We hope to complete it just
23 about that time.

24 THE PRESIDENT: If we should agree to what
25

1 you propose and we finish the Tri-Partite Pact section
2 before the 23rd, the vacation, or recess, will commence
3 as from the time we finish the Tri-Partite Pact section.

4 MR. BLEWETT: That is quite satisfactory, sir.

5 THE PRESIDENT: What have you to say, Mr.
6 Tavenner?

7 MR. TAVENNER: If the Tribunal please, the
8 prosecution does not understand the reason for post-
9 posing the opening statement of this phase for a
10 period of nearly two months.

11 THE PRESIDENT: I suppose if they are not
12 ready to present the phase, they are not ready to
13 open on it. One follows from the other, I would say.
14 You made it clear enough to us, either here or in
15 Chambers -- you, the defense, I mean -- that you were
16 not prepared to go on with that general phase. Not
17 only were you not prepared with the individual cases,
18 but you were not prepared with the general phase. I
19 say that with a purpose, but it is in accordance with
20 fact.

21 Every alternative to a recess was considered
22 by us. We were told they could not go ahead with that
23 general phase. Therefore, they cannot be expected to
24 open on it properly.

25 MR. TAVENNER: I had not understood, if the

1 Tribunal please, that they were not prepared to go
2 ahead with their opening statement; that they merely
3 requested that it be delayed.

4 THE PRESIDENT: An opening statement implies
5 that you know every essential matter you are going to
6 prove.

7 We have to take the decision of the Court on
8 this, **first**.

9 I understand we will have an opening state-
10 ment on the Tri-Partite Pact, Mr. Cunningham.

11 MR. CUNNINGHAM: Yes, your Honor, and I be-
12 lieve you will find it very brief.

13 THE PRESIDENT: The Tribunal approves of the
14 defense proposal. So, you may open the Tri-Partite
15 Pact section, Mr. Cunningham.

16 MR. CUNNINGHAM: Opening statement, Tri-
17 Partite Pact, Pacific Division V, Sub-Division 1:
18 the Tri-Partite Pact was concluded between Japan,
19 Germany and Italy on 27 September, 1940.

20 The prosecution alledged that it was an ex-
21 tension or revival of the abortive negotiations for
22 the so-called "strengthening of the Anti-Comintern
23 Pact," which were conducted between the three countries
24 in 1938 and 1939, and that "this pact in its essence
25 contained the ultimate development of the plot of the

1 improvement of Japanese-American relations. They
2 made every effort to attain this objective and that
3 the Japanese-German relations during the period re-
4 mained extremely cool. The efforts of Japan were
5 not reciprocated by the United States. Economic
6 pressure upon Japan increased by the United States
7 and other countries after the expiration of the Japa-
8 nese-American Commercial Treaty.

9 The German victory in Europe in May 1940
10 gave Japan reason to fear the emergence of Germany
11 in East Asia as successor to France and the Nether-
12 lands. The coolness of the Japanese-German relations
13 at that time did not permit any possibility of collab-
14 oration of the two countries concerning these Far
15 Eastern problems. The prosecution has tendered evi-
16 dence of Japanese-German contact concerning the ques-
17 tion of Netherlands East Indies and French Indo-China,
18 especially conversation between Ribbentrop and SATO,
19 alleging the existence of collaboration. It will be
20 proved that these facts show the contrary; non-
21 collaboration between Japan and Germany. It will also
22 be shown that the negotiations for the Tri-Partite
23 Pact began in September, 1940 under the KONOYE Cabinet,
24 and not in June of the same year as alleged by the
25 prosecution.

1 The prosecution alleged that the purpose of
2 the Tri-Partite Pact was the establishment of the so-
3 called "new order," which had for its purpose the ex-
4 tinguishment of democracy throughout the world and the
5 subjugation of all the nations by the aggressive states.

6 In rebuttal of this charge, it will be proved
7 that the Japanese Government concluded the Tri-Partite
8 Pact for the defensive and peaceful purpose of con-
9 tributing to the world peace; Japan wanted ultimately
10 to improve the relations with all countries of the
11 world, especially with the United States of America,
12 on the basis of equality and mutual respect. She
13 thought it necessary, as the primary step for it, to
14 prevent the deterioration of her political position by
15 getting out of the international isolation which faced
16 her at that time. After the failure of her policy of
17 direct approach to the Anglo-Saxon countries and facing
18 the danger of complete international isolation as a
19 result of increasing American pressure, Japan was com-
20 pelled to the conclusion that her ultimate goal, the
21 improvement of the Japanese-American relations, could
22 not be attained without first improving her international
23 political situation. By joining with other countries,
24 even if some danger should there be involved, this
25 must be done under the international circumstances

1 then prevailing, Germany and Italy were the only
2 countries which could be used as allies. That the
3 Japanese Government had no aggressive purpose and
4 took every precaution in order not to be drawn into
5 the European war as a result of the Tri-Partite Pact
6 will be shown by the official record of the negotiations
7 and will be the object of part of our evidence.

8 On the interpretation of the term "new order"
9 it will be shown by evidence that it meant the estab-
10 lishment of a regional organization as part of the
11 world peace program. It was not aggressive in its
12 nature. It was not in violation of any existing
13 treaties and obligations. Evidence will be tendered
14 proving the fantasy of the allegation that leaders of
15 Japan and Germany contemplated conquest or division
16 of the world. As to the prosecution's charge that
17 the pledge of mutual assistance as provided in the
18 pact would become effective automatically, it will be
19 proved that this was not so.

20 Concerning the Japanese-German-Italian re-
21 lations after the conclusion of the Tri-Partite Pact
22 until the outbreak of the Pacific War, the defense will
23 prove that there was no cooperation by pointing out the
24 following facts, namely, that:

25 (1) Germany wanted Japan to join the war

1 against Britain;

2 (2) Germany, after the outbreak of the
3 German-Russian war, wanted Japan to go against Soviet
4 Russia when the German Army was knocking at the door
5 of Moscow;

6 (3) Germany did not wish a Japanese-American
7 war; Japan acted independently in the war with the
8 United States.

9 Most of the evidence presented by the prose-
10 cution with respect to the Singapore question are
11 documents of the German Government, which by their
12 own nature are one-sided.

13 Skipping, then, down to the next paragraph.

14 The defense will tender evidence that Japan
15 always refused in a diplomatic way German request to
16 enter the war against Britain. These requests were
17 contradiction of assurances given by Germany at the
18 time of the conclusion of the Pact. It will be clear-
19 ly shown that the records of various conversations
20 introduced by the prosecution kept by the German
21 Foreign Office were not official or accurate, and that
22 the German leaders were not telling Foreign Minister
23 MATSUOKA the truth when he visited Berlin in March
24 and April, 1941.
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21 Foreign Office were not official or accurate, and that
22 the German leaders were not telling Foreign Minister
23 MATSUOKA the truth when he visited Berlin in March
24 and April, 1941.
25

1 Towards Soviet Russia, Japan strove to
2 maintain a friendly relation in accordance with the
3 stipulation and spirit of the Tri-Partite Pact. She
4 emphatically refused repeated German demands to join
5 her in the war against Soviet Russia. Evidence will
6 also be tendered to show that Japan considered the
7 German attack on Russia which occurred in spite of
8 her opposition, as a betrayal on the part of Germany,
9 and considered that the very foundation of the Tri-
10 Partite Pact was shattered by this act of Germany.

11 The prosecution has pointed to the Japanese
12 occupation of French Indo-China as instances of
13 Japanese-German collaboration. It will be shown,
14 that in the solutions of these problems Japan did
15 not utilize German pressure on the French home
16 Government.

17 Japanese-German relations experiences fur-
18 ther set-back when the Japanese Government entered
19 in informal negotiations with the United States in
20 April 1941. Germany entertained doubts as to Japan's
21 intentions, and requested that Germany be informed of
22 the facts about the negotiations and be permitted to
23 participate in them, but Japan did not comply with
24 this. Evidence will also be tendered on this point.

25 The circumstances which compelled Japan to

1 decide the war with the United States of America will
2 be clarified thoroughly in other sub-divisions of
3 this phase.

4 It will be shown that the Japanese decision
5 resulted from consideration of self-defense, inde-
6 pendent of any exterior influences, not to mention
7 any consultation with Germany and Italy, and that
8 Japan did not accept any assistance or help from the
9 two countries in setting up her plans of military
10 operations. On the contrary, Japan kept her decision
11 to fight strictly secret, and the attack on Pearl
12 Harbor was most complete a surprise to Germany, to
13 which fact evidence will be tendered. It will also
14 be shown on the other hand that German declaration
15 of war on the United States of America was not con-
16 nected with the Tripartite Pact, and Germany con-
17 sidered herself to be de facto in a state of war
18 with the United States since the "shoot at sight"
19 order of President Roosevelt in September 1941.

20 Convincing evidence will be tendered not
21 only from Japanese and German, but also from Allied
22 sources, as to the fact that Japanese-German-Italian
23 relations during the war were not close, making the
24 military convention practically valueless, but in
25 contrast to the intimate cooperation of the Allied

1 side, politically, economically and militarily,
2 Japan and the two countries of Germany and Italy in
3 fact fought separate wars.

4 It should be observed by the Tribunal that
5 the effect of the Italian relationship with Germany
6 and Japan is ignored in our presentation of the evi-
7 dence. History has already shown that Italy was
8 impotent and a useless ally, and even in the opti-
9 mistic evaluation of her aid in any cause the re-
10 sult would have to be nil. The fact that she sur-
11 rendered in 1943 and that Germany surrendered in 1945
12 and that Japan surrendered later precludes any
13 necessity of justifying or explaining No-Separate
14 Peace Pact mentioned so often by the prosecution in
15 their evidence.

16 With the permission of the Tribunal I pre-
17 sent documents and witnesses supporting this brief
18 statement.

19 Before I present my documents, I would like
20 to say, if the Tribunal please, that I should like
21 to have it definitely understood that my presenta-
22 tion of the evidence in this Tri-Partite Section of
23 the Pacific Division of this case must not be taken
24 to indicate that Mr. OSHIMA had anything to do with
25 the negotiation or the deliberations which brought

1 about the pact.

2 To the contrary, I wish to emphasize that
3 Mr. OSHIMA was in complete retirement from November
4 1939 to February 1941. I would like to have the
5 Tribunal bear that in mind, please.

6 Before we present the evidence in this
7 matter it would probably be most helpful if Mr.
8 Tavenner would state the prosecution's position with
9 relation to the Tri-Partite Pact in order that we
10 will meet the issue squarely, perhaps eliminate some
11 instead of approaching the matter by tangents and
12 collaterally. This procedure proved most agreeable
13 on the question of the Anti-Comintern Pact.

14 Our evidence is prepared on the theory that
15 the making of a defensive international agreement by
16 two or more nations through their plenipotentiaries is
17 the exercise of an inherent legal right of nations;
18 that there is absolutely no personal responsibility
19 on the part of individuals for the acts or the conse-
20 quences. We understand that it is the prosecution's
21 claim that the defendants individually or collective-
22 ly are charged with violating international agree-
23 ments. They claim such agreements constitute inter-
24 national law. The offense, we consider, is in breach
25 of agreements, not the execution or negotiation of

1 them. Their position is far from clear on this
2 question.

3 THE PRESIDENT: Just tender your evidence,
4 Mr. Cunningham. We will hear all your points later.
5 We have heard most of them. We will hear them
6 again, perhaps.

7 MR. CUNNINGHAM: In tendering evidence of
8 the first sub-division, I want to prove the break-
9 down of Japanese-German relations caused by the con-
10 clusion of the German-Russian Non-Aggression Treaty
11 on 23 August 1939, in order to show that no continu-
12 ity existed in the relation between Japan and Germ-
13 any as charged by the prosecution.

14 I offer in evidence defense document No.
15 1313, a telegram from Weizsacker, German Vice
16 Foreign Minister, to Ambassador Ott in Tokyo, dated
17 21 June 1939, to show that as early as June of 1939
18 Germany was no more seriously interested in an agree-
19 ment with Japan, for which negotiations were going
20 on since the summer of 1938.

21 This document and the next two documents
22 are preliminary, furnishing the basis and back-
23 ground for documents to be tendered later.

24 THE PRESIDENT: Admitted on the usual
25 terms.

1 CLERK OF THE COURT: Defense document 1313
2 will receive exhibit No. 2722.

3 (Whereupon, the document above re-
4 ferred to was marked defense exhibit No.
5 2722 and received in evidence.)
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1 MR. CUNNINGHAM: Skipping the formal parts
2 (reading):

3 "Personally for the Ambassador only on
4 telegram No. 257.

5 "The Reich Foreign Minister wishes to tell
6 you that he absolutely agrees to continuing your
7 individual talks in accordance with the information
8 conveyed to you. He wishes, however, to ask you
9 not to press now the question of the conclusion of
10 the treaty with respect to the time."

11 Signed, "Weizsacker."

12 We next offer in evidence defense document
13 1632, one of the three preliminary documents, a
14 memorandum signed by Woermann, Director of the
15 Political Department of the German Foreign Office,
16 dated 20 July 1939, to show bad faith of Germany
17 towards Japan in concealing the fact that negotia-
18 tions for a non-aggression treaty were going on
19 between Germany and Russia at that time.
20

21 THE PRESIDENT: Admitted on the usual terms.

22 CLERK OF THE COURT: Defense document 1632
23 will receive exhibit No. 2723.

24 (Whereupon, the document above
25 referred to was marked defense exhibit
No. 2723 and received in evidence.)

1 MR. CUNNINGHAM: Skipping the formal parts
2 (reading):

3 "Berlin, 19 July 1939.

4 "The Japanese Counsellor of the Embassy
5 who was apparently dispatched by his Ambassador to
6 gain information, visited me today and began a talk
7 with an extremely detailed explanation of the late
8 incident which occurred on the border between
9 Manchukuo and Outer Mongolia. The events, accord-
10 ing to his explanations, occurred in the area where
11 a river called Halahaho on most maps forms the
12 border line. It is true that there exists no
13 clear agreement on the border line, but the said
14 river has been practically recognized as the border
15 line. Since April of this year Outer Mongolia
16 troops at first appeared on the east side of the
17 river again and again; later they were reinforced
18 with Russian troops. At the same time Outer-
19 Mongolian or Russian airplanes often appeared over
20 Manchurian territory. In one case an airplane flew
21 deep into the land and dropped a bomb upon a bridge
22 about 30 - 40 km to the east of Tsitsihar. Finally
23 the Mongolians and Russians in large formation have
24 appeared on the east side of the river and that with
25 motorized troops and tanks.

1 "Thereupon, a pitched battle with major
2 units developed, whereby the Japanese gained the
3 upperhand. The fighting activities, however, have
4 not yet entirely ceased along the whole line. The
5 Outer-Mongolians and Russians have lost thousands
6 of men and hundreds of airplanes. On the Manchurian
7 side, Japanese troops have also taken part in the
8 battle. The total loss of our side amounts to
9 about 1000 men. As to the reason of such Russian
10 action, the Japanese Government is entirely de-
11 pendent upon a supposition: The action might have
12 the aim to ascertain whether the Japanese despite
13 the warlike events in China are still strong enough
14 also in Manchukuo.

15 "Another possibility might be to give a
16 kind of moral help to the Englishmen in relation
17 to the occurrence in Tientsin. A third interpre-
18 tation is that the Russians are desiring to display,
19 in consideration of the negotiation in Moscow that
20 they are not interested in the events in Europe but
21 that they are looking toward the Far East.

22 "Finally, it is even insisted that the
23 Russians are eager to create difficulties between
24 the Anti-Comintern Powers in this way.

25 "Hereupon, Mr. Usami apparently reached

1 the point to which he was steering. First he in-
2 quired after our information about the English-
3 French-Russian negotiations.

4 "I have given him our information concern-
5 ing the negotiation of the Western Powers with Moscow,
6 which coincided with his own.

7 "Then he inquired after our relation with
8 the Soviet Union in a very emphatic form.

9 "He referred among others to a report of
10 the 'News Chronicle,' according to which a non-
11 aggression pact between Germany and Russia is now
12 being negotiated and which mentioned the rumor of
13 the dispatch of prominent German persons to Moscow

14 "I replied to him that all those news were
15 nothing but a swindle. It is true that we are now
16 keeping contact with Soviet Union because of an
17 economic negotiation. The quantity of trade between
18 us has been reduced to an insignificant sum from
19 its very considerable height in former times. There
20 are plenty of useful things in Russia, which we can
21 utilize quite well, so it is quite natural that we
22 are trying to further our economic relation to some
23 degree. This has lead to nothing more than pre-
24 liminary diplomatic talks, being held partly in
25 Moscow, partly in Berlin.

1 "Mr. Usami then inquired after the details
2 on the German credits given to the Soviet Union in
3 former days. I have referred him to Mr. Wiehl for
4 further information on this question.

5 "Mr. Usami then came out with the follow-
6 ing: Between Germany and Japan economic negotia-
7 tions are also being held at this moment. Japan
8 is extraordinarily capable of accepting German
9 machines. Our negotiations, however, have ex-
10 plained that the German capacity in this connec-
11 tion is restricted and that some sort of machines
12 could not be delivered because of her own require-
13 ments. It would make an extremely unpleasant
14 impression in Japan, if those machines which Japan
15 had been denied would yet be sent to the Soviet
16 Union. I have referred Mr. Usami to Mr. Wiehl also
17 in this point. In the end the Counsellor of the
18 Embassy came back again to the rumour on the
19 political rapprochement between Germany and the
20 Soviet Union and said it would be anyway quite
21 good, if a soothing declaration in this regard be
22 given in Tokyo. The Embassy has on its part already
23 reported to that effect.
24

25 "During our talk I have also stated upon
inquiries that it is a known fact that the German

1 press does not attack the Soviet Union to such a
2 degree as in the past, and described this as a fact
3 which implies nothing sensational because of the
4 neighborhood of the Soviet Union with Poland."

5 Signed, "Woermann."

1 I now offer in evidence defense document
2 No. 1633, the last of the three preliminary documents,
3 a telegram sent by Weizsacker to Schulenburg, German
4 ambassador in Moscow, dated 22 July 1939, to show
5 that Germany was contacting Russia already in July
6 1939 for a political understanding.

7 THE PRESIDENT: Admitted on the usual terms.

8 CLERK OF THE COURT: Defense document 1633
9 will receive exhibit No. 2724.

10 (Whereupon, the document above
11 referred to was marked defense exhibit No.
12 2724 and received in evidence.)

13 MR. CUNNINGHAM: Skipping the formal parts,
14 (Reading):

15 "For the Ambassador:

16 "Referring to the telegraphic information
17 No. 132.

18 "Barbarin called on Schnurre as announced by
19 you and declared himself as authorized to negotiate
20 here and also to sign the treaty in Berlin. Depending
21 upon the progress of the talks we will reserve the
22 decision to us, whether a part of the negotiations
23 should nevertheless be transferred to Moscow. In any
24 case we will proceed here ready for outspoken conces-
25 sions, because the conclusion -- and that at an

1 earliest possible date -- is welcome for general
2 reasons.

3 "With respect to the purely political side
4 of our talks with Russia, we consider the waiting
5 period ordered to you by the telegraphic instruction
6 No. 134 as expired. You are therefore authorized,
7 without pressing in any way, again to spin the
8 thread further and to utilize for that purpose es-
9 pecially conversations on current affairs.

10 "In case from the Russian side our relations
11 to Japan should be brought to discussion, it is
12 for you perhaps of interest to know that the Japanese
13 ambassador in Berlin again as late as yesterday
14 described the shootings and skirmishes in Outer
15 Mongolia as not of importance.

16 "(Signed) Weizsacker"

17 I now offer in evidence defense document
18 No. 704, text of the non-aggression treaty between
19 Germany and Russia concluded on 23 August 1939, to
20 show that this pact was a clear violation of Article
21 II of the Secret Agreement attached to the Anti-
22 Comintern Pact of 25 November 1936, exhibit No. 480,
23 in which Japan and Germany pledged each other not to
24 enter any agreement with Russia contrary to the spirit
25 of that agreement.

1 Through this treaty between Germany and
2 Russia the Secret Agreement attached to the Anti-
3 Comintern Pact was abolished politically.

4 THE PRESIDENT: Admitted on the usual terms.

5 CLERK OF THE COURT: Defense document 704
6 will receive exhibit No. 2725.

7 (Whereupon, the document above
8 referred to was marked defense exhibit No. 2725
9 and received in evidence.)

10 MR. CUNNINGHAM: I now read exhibit No. 2725:

11 "The Non-Aggression Pact between Germany
12 and the Union of Soviet Socialist Republics.

13 "The Government of Germany and the Government
14 of the Union of Soviet Socialist Republics, urged by
15 the hope to consolidate peaceful relations between
16 Germany and the Union of Soviet Socialist Republics
17 and proceeding from the basic stipulations in the
18 Neutrality Pact concluded between Germany and the
19 Union of Soviet Socialist Republics in April, 1926,
20 have arrived at the following agreement.

21 "Article I.

22 "Both contracting parties are under obligation
23 not to initiate any military movement, any offensive
24 action, or any invasion against each other, either
25 single-handed or in conjunction with any other country.

1 "Article II.

2 "In case one of the contracting parties
3 becomes the object of military action by a third
4 party, the other contracting party will in no way
5 give support to the third party.

6 "Article III.

7 "The Governments of the two contracting
8 powers, for the purpose of informing each other of
9 whatever problems involving their interests in common,
10 will constantly keep in touch and consult with each
11 other also in the future.

12 "Article IV.

13 "Neither of the contracting parties will
14 join any group of countries directly or indirectly
15 hostile to the other contracting party.

16 "Article V.

17 "In case any dispute or conflict with regard
18 to some problem arises between the contracting parties,
19 they will settle the said dispute or conflict chiefly
20 through friendly exchange of views or, if necessary,
21 through the establishment of an arbitration board.

22 "Article VI.

23 "The present Pact will remain in force for
24 a term of ten years. If neither of the contracting
25 parties notifies the other, a year before the Pact

1 expires, of its denunciation of the Pact, it will be
2 considered that the operation of the Pact will auto-
3 matically continue for the following five years.

4 "Article VII.

5 "The present Pact is to be ratified in
6 the shortest possible time. The ratification acts
7 will be exchanged in Berlin. The present Pact will
8 come into force as soon as it is signed. Two copies
9 of the present Pact, written in the German and Russian
10 language, were made in Moscow on 23 August 1939.

11 "On behalf of the Government of Germany,

12 "Von Ribbentrop

13 "Authorized by the Government of the Union
14 of Soviet Socialist Republics,

15 "S. Molotov."

16 I now call the Court's attention to prosecution's
17 exhibit No. 775, transcript page 7890, KIDO's Diary of
18 23 August 1939, to show that bad faith in concluding
19 the German-Russia Treaty shocked and surprised Japan.
20 KIDO wrote that he "was astonished at this extremely
21 treacherous act considering the existence of the Anti-
22 Comintern Pact and Secret Pact."

23 I now offer in evidence defense document
24 No. 1634, a telegram from Mackensen, German Ambassador
25 in Rome, to the German Foreign Office dated 23 August

1 1939 to show that the German-Russian Treaty stirred
2 deep indignation in Japan as reported by the Italian
3 Ambassador in Tokyo, and a complete breakdown of the
4 Japanese-German-Italian relations was obvious.

5 THE PRESIDENT: Admitted on the usual terms.

6 CLERK OF THE COURT: Defense document 1634
7 will receive exhibit No. 2726.

8 (Whereupon, the document above
9 referred to was marked defense exhibit No. 2726
10 and received in evidence.)

11 MR. CUNNINGHAM: I now read from exhibit 2726,
12 skipping the formal parts:

13 "Top Secret! No. 364 of 23.8

14 "Top secret. Referring to my long distance
15 telephone talk with Counsellor of the Legation, Hewel.
16 Count Ciano requested me to come to see him this
17 evening and according to a report of the Italian
18 Ambassador in Tokyo, he related, 'Since this report
19 seems to be of very important nature, please transmit
20 it at the earliest possible moment. It will enable
21 us to take counter measures with speed and force.'

22 The Ambassador's report is based upon a report of his
23 military attache, who was called yesterday (evening)
24 to the Japanese War Ministry, and told that: The Non-
25 Aggression Pact now to be concluded in Moscow has

1 caused deep indignation in Japan towards Germany;
2 that it will mean betrayal to the German-Japanese
3 friendship and to the spirit of the Anti-Comintern
4 Pact, especially when Japan has never been informed
5 of such intention in advance. The Ambassador antici-
6 pates the below-mentioned possible developments:
7 (To what extent is this report based upon the conver-
8 sation, which the military attache had in the War
9 Ministry? It is not clear whether the report is
10 based upon the ambassador's own opinion. Ciano
11 said the Ambassador, in this connection, is an es-
12 pecially calm observer.) 1. Collapse of the present
13 government and formation of a new pro-British cabinet.
14 2. Change of the Japanese foreign policy. 3. Recall
15 of the Ambassador from Berlin and probably of that from
16 Rome. 4. Sending of reinforcements to the Kwantung
17 Army to keep balance with the Russian reinforcement of
18 strength.

19 "The Ambassador's report continues that if
20 the Axis Powers intend to interfere with the attitude
21 of Japan, something must be done, and that the Japanese
22 Army has declared to have received no direct information
23 from Berlin and Rome up to the present. Ciano has
24 immediately sent instructions to the Ambassador in
25 Tokyo requesting him to explain to the Japanese that

1 1. the Italian Policy has never been changed and
2 her friendliness and understanding towards Japan also
3 remain unchanged, that 2. the Japanese in judging
4 the situation should remember that weakening of either
5 England and France in Europe is only to her advantages,
6 that 3. recall of the Ambassadors would be an unprece-
7 dented measure and would only aggravate the situation,
8 which, after all our efforts, has been smoothed out
9 and seems to be in no way unfavorable for Japan.

10 "Finally it is desired that the Ambassador
11 assure the Japanese that they should continue to have
12 full confidence in Italy as in the past. Attaching
13 an extreme importance to the Ambassador's report, Ciano
14 said that he hope that Germany also would do everything
15 possible through her Ambassador and press to calm
16 down the Japanese. Ciano thus concluded his report.

17 "(Signed) Mackensen."

18 I now call the Court's attention to prosecution
19 exhibit No. 486-L, transcript page 6122-6123, a tele-
20 gram sent by Ott to Berlin on 25 August 1939 to show
21 that Japan protested to Germany upon conclusion of the
22 Non-Aggression Treaty with Russia and broke off the
23 negotiations, Foreign Minister ARITA stating to
24 Ambassador Ott that "the Japanese Government had
25 interpreted the conclusion of the Non-Aggression Pact

1 as finally terminating the present negotiations between
2 Japan, Germany and Italy."

3 THE PRESIDENT: Mr. Tavenner.

4 MR. TAVENNER: If the Tribunal please, I
5 feel it is necessary to again call to the Tribunal's
6 attention the fact that exhibits are being frequently
7 inserted in the order list as an excuse for making an
8 argument to the Tribunal at this time. Of the 91
9 documents that appear on this order list 26 are exhibits
10 that have been previously introduced. With the excep-
11 tion of a few instances the documents have been read
12 in entirety. I submit that the only purpose that
13 could be had in placing these exhibits on the order
14 list is to afford the opportunity of making a speech
15 or an argument, and previous references by the prosecu-
16 tion and by the Tribunal to this matter seems not to
17 have corrected the situation.

18 THE PRESIDENT: Stating a purpose sometimes
19 involves an argument. It will be sufficient merely
20 to refer to some of these exhibits which are being
21 read in extenso. The purpose of tendering some of
22 these documents is so transparently clear that there
23 is no need to state it. We hope that Mr. Cunningham
24 will not, in stating his purpose, resort to argument
25 and that he will state his purpose only when that is

1 necessary and in the clearest and the fewest terms.

2 MR. CUNNINGHAM: Your Honor, may I say just
3 a word in explanation?

4 The purpose in referring to these prosecution
5 documents is to save time. By mere reference to what
6 the document of the prosecution does for us we aim to
7 save putting on a witness or putting on several in-
8 dividual documents, and I think it is more profitable
9 to use the prosecution's document against them than
10 one of our documents against them.

11 THE PRESIDENT: We seek the fullest coopera-
12 tion of the defense in saving time.

13 MR. CUNNINGHAM: Exhibit No. 782 is a note
14 dated 26 August 1939 sent by the Japanese Embassy in
15 Berlin to the German Foreign Office. It is shown in
16 this document that the Japanese Embassy in Berlin had
17 filed, under the direction of the home government, a
18 note with the German Foreign Office protesting against
19 the conclusion of the German-Soviet Non-Aggression Pact.
20 (Transcript page 7912).
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1 I now offer in evidence defense document
2 No. 1529, an excerpt from "Peace and War," published
3 by the United States State Department, which is a
4 memorandum signed by Hull concerning a conversation
5 with the Japanese Ambassador HORINOUCI, dated 26
6 August 1939, to show that Japan communicated to the
7 United States Government the breaking off of the
8 negotiations with Germany and declared the intention
9 to adopt a new foreign policy.

10 THE PRESIDENT: Admitted on the usual terms.

11 CLERK OF THE COURT: Defense document 1529
12 will receive exhibit No. 2727.

13 (Whereupon, the document above
14 referred to was marked defense exhibit
15 No. 2727 and received in evidence.)

16 MR. CUNNINGHAM (Reading:

17 "Excerpt from 'Peace and War.'

18 "Memorandum by the Secretary of State
19 Regarding Conversation with the Japanese Ambassador
20 (HORINOUCI).

21 "Washington, August 26, 1939.

22 "The Ambassador of Japan called at his own
23 request. He proceeded to refer to the reports,
24 already published in the American press, to the
25 effect that American officials were incorrectly

1 attributing anti-American movements and demonstra-
2 tions in China to Japanese officials or to their
3 influence in thus instigating the Chinese. The
4 Ambassador handed me the attached paper which I
5 proceeded to read. I thanked him for the attention
6 his Government had given to this matter and the
7 spirit seemingly prompting his Government to seek
8 to clear it up.

9 "I then said that, having seen in the
10 American press the purpose and nature of his con-
11 templated call on me, I had requested the Far
12 Eastern Division to jot down a list of instances
13 of transgressions by Japanese or due to Japanese
14 influence in China to the detriment and infury
15 of Americans and of American interests. I added
16 that this list of incidents had not been elaborated
17 but that I would proceed to read them. I then read
18 the memorandum prepared by the Far Eastern Division
19 attached hereto and marked "A." The Ambassador
20 appeared somewhat surprised and at a loss for
21 further comment with regard to this paper. He said
22 he would be pleased to have a copy of it. I replied
23 that I would be glad to request the Far Eastern
24 Division to put it in more elaborate form if possi-
25 ble and to send a copy to him at the Japanese

Embassy.

1 "The Ambassador then said that, speaking
2 personally, he might say his Government yesterday
3 had decided to abandon any further negotiations
4 with Germany and Italy relative to closer relations
5 under the Anti-Comintern Pact to which they have
6 been parties for some time. He added that the
7 change in affairs in Europe made this course mani-
8 fest, and, furthermore, it was plain that his
9 Government would find it important to adopt new
10 foreign policy in more or less respects. I might
11 say that he prefaced this general reference to his
12 country by reiterating his personal desire to clear
13 up any misunderstandings or differences between our
14 two countries and to restore the friendly relations
15 heretofore existing."

16 Skipping to the bottom of the page:

17 "I then referred to his comment about Japan
18 and her purpose to adopt a new foreign policy, and I
19 made observations substantially as follows:

20 "The principles and practices of American
21 policy in regard to the world in general and the Far
22 East in particular are well known to all governments
23 everywhere.

24 "During recent years Japanese authorities
25

Embassy.

1 "The Ambassador then said that, speaking
2 personally, he might say his Government yesterday
3 had decided to abandon any further negotiations
4 with Germany and Italy relative to closer relations
5 under the Anti-Comintern Pact to which they have
6 been parties for some time. He added that the
7 change in affairs in Europe made this course mani-
8 fest, and, furthermore, it was plain that his
9 Government would find it important to adopt new
10 foreign policy in more or less respects. I might
11 say that he prefaced this general reference to his
12 country by reiterating his personal desire to clear
13 up any misunderstandings or differences between our
14 two countries and to restore the friendly relations
15 heretofore existing."

16 Skipping to the bottom of the page:

17 "I then referred to his comment about Japan
18 and her purpose to adopt a new foreign policy, and I
19 made observations substantially as follows:

20 "The principles and practices of American
21 policy in regard to the world in general and the Far
22 East in particular are well known to all governments
23 everywhere.

24 "During recent years Japanese authorities
25

and or agencies have been pursuing courses which come
into direct conflict with those principles and poli-
cies and which involve disregard of principles of
international law and of treaties between the United
States and Japan and also multilateral treaties to
which the United States and Japan are parties.

"The United States had made representations
over and over and over again in objection to or
protest against overt acts of these types. The
Japanese Government has given assurances over and
over again that it has regard for the principles
and the rules and the provisions involved and that
it will show its regard for them -- and over and
over Japanese authorities have immediately committed
other acts in disregard thereof.

"We have clear evidence of inspiration by
Japanese authorities or of action by agencies thereof
hostile not only to occidental nationals and interests
in general, but to American nationals and interests in
particular. These courses of action by Japanese have
resulted in arousing against Japan feelings of sus-
picion and attitudes of opposition on the part of
almost all of the other powers which have interests in
the Far East, especially in China, including the
United States.

1 "It should be evident to Japan that there
2 is something wrong with policies and practices on
3 the part of one nation which arouse antagonism on
4 the part of almost all other nations in contact
5 with that nation.

6 "The United States wishes to have amicable
7 relations with every other country in the world.
8 We have in the past had very friendly relations
9 with every country in the Far East, including Japan.
10 Our policy is a policy of 'Live and let live.'
11 We seek nowhere any special position; but we seek
12 everywhere equality of opportunity under conditions
13 of fair treatment and security.

14 "The world is being given today new object
15 lessons with regard to the futility of policies
16 wherein nations plan to take advantage of other
17 nations by use of armed force in disregard of moral
18 principles and legal principles and generally accepted
19 axioms of friendly and profitable general interna-
20 tional intercourse.

21 "The future of American-Japanese relations
22 lies largely in the hands of Japan. American policy
23 is a policy of friendliness and fair dealing toward
24 all nations. It will not change.

25 "The Ambassador seemed appreciative and

1 this ended the conversation."

2 Signed, "Cordell Hull."

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1 I now offer in evidence defense document
2 710, the content of which was marked for identification
3 as exhibit 2346, transcript page 17,836, to show
4 that the HIRANUMA Cabinet resigned as a result of
5 the German-Russian Treaty.

6 THE PRESIDENT: Brigadier Nolan.

7 BRIGADIER NOLAN: May it please the Tribunal,
8 in the submission of the prosecution an important
9 announcement of this kind should not be attempted
10 to be placed in evidence through the medium of a
11 newspaper article. Similar instances have arisen
12 on a number of occasions and the Tribunal has, I think,
13 almost always taken the position that when the matter
14 is of importance it must be proved in the proper way.

15 MR. CUNNINGHAM: Your Honor, I was under
16 the impression that it was the fact in which the
17 Tribunal was interested, not in the manner of its
18 presentation. The form is immaterial whether it
19 is by newspaper article, or whether it is by the
20 spoken word, or whether it is by affidavit. Whether
21 or not it is true is the question and I am only asking
22 you to take it for whatever value it has.

23 THE PRESIDENT: We can never take the reasons
24 for the resignation of a cabinet from the newspapers.
25 I think this very point has arisen before and we

1 "(An article of the 'The Tokyo Asahi-
2 Shimbun' on August 29th.)

3 "Since I took the helm of the government
4 upon receiving the Imperial Command, I, in cooperation
5 with my cabinet members and in conformity with the
6 Imperial wish, have been endeavouring to overcome
7 the prevailing difficulties and establish a New
8 Order in East Asia, whereby to attain the aim of
9 the Holy War.

10 "Moreover, our diplomatic policy which
11 followed the Imperial plan upon which Japan was
12 founded and was established on the basis of morality,
13 had mainly aimed at contributing to world peace and
14 world culture. Following this principle our policies
15 towards Europe have been formulated and reports
16 thereof have frequently been made to the throne.
17 As the recently concluded German-Soviet Non-Aggression
18 Pact, however, gave rise to a new phase of complexity
19 and grotesqueness in the situation of Europe, it
20 became necessary for our country have in view the
21 abandonment of the policies which have hitherto
22 been prepared and to establish new policies. This
23 means evidently nothing but a change of what I have
24 repeatedly reported to the Throne, and this causes
25 the Emperor's worry again; I am in sincere awe thinking

1 have made the same pronouncement. You see, it is
2 a question of weight. If better evidence is avail-
3 able, and it ought to be, because I think at least
4 one of the Members of the Cabinet is in the dock,
5 we may take the view eventually as what appears
6 in the press is not supported by those who know --
7 if that be the case -- that the press report is of
8 no value.

9 The attitude of my colleagues is that they
10 are prepared to accept it as proof or some proof of
11 the resignation of the cabinet, but not of the reasons
12 for its resignation. The objection is overruled
13 and the document admitted on the usual terms.

14 We were told that the document was marked
15 for identification only and was not in evidence too.
16 However, I understand it is not in fact in evidence.

17 CLERK OF THE COURT: Defense document 710
18 is now marked admitted into evidence and will receive
19 exhibit No. 2728.

20 (Whereupon, the document above
21 referred to was marked defense exhibit
22 No. 2728 and received in evidence.)

23 MR. CUNNINGHAM: (Reading)

24 "Statement of Premier HIRANUMA

25 "On August 28, the 14th year of Showa

1 "(An article of the 'The Tokyo Asahi-
2 Shimbun' on August 29th.)

3 "Since I took the helm of the government
4 upon receiving the Imperial Command, I, in cooperation
5 with my cabinet members and in conformity with the
6 Imperial wish, have been endeavouring to overcome
7 the prevailing difficulties and establish a New
8 Order in East Asia, whereby to attain the aim of
9 the Holy War.

10 "Moreover, our diplomatic policy which
11 followed the Imperial plan upon which Japan was
12 founded and was established on the basis of morality,
13 had mainly aimed at contributing to world peace and
14 world culture. Following this principle our policies
15 towards Europe have been formulated and reports
16 thereof have frequently been made to the throne.
17 As the recently concluded German-Soviet Non-Aggression
18 Pact, however, gave rise to a new phase of complexity
19 and grotesqueness in the situation of Europe, it
20 became necessary for our country have in view the
21 abandonment of the policies which have hitherto
22 been prepared and to establish new policies. This
23 means evidently nothing but a change of what I have
24 repeatedly reported to the Throne, and this causes
25 the Emperor's worry again; I am in sincere awe thinking

1 of the grave responsibility for assisting the
2 Emperor by giving advice to him. As a Japanese
3 subject, it is nothing less than becoming familiar
4 with the Emperor and slighting his favour granted
5 upon me to remain'longer in my present post.
6 Moreover, when we intend to tide over this critical
7 situation into which our country is driven by arranging
8 its organization and improving upon its diplomatic
9 devices, it would be, I believe, of urgent necessity
10 to effect conversion of the situation and to bring
11 a renewal upon our minds. For these reasons this
12 day I have reported to the Throne and in awe begged
13 to be relieved of my post."
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1 THE PRESIDENT: Seeing the limited extent to
2 which it is admitted, we have not bothered to ask you
3 for copies of what you read. We have not been served
4 with any. Nevertheless, if you offer us copies, Mr.
5 Cunningham, we won't refuse them.

6 MR. CUNNINGHAM: Well, I probably misunder-
7 stood your intention and your probably misunderstood
8 mine; I don't know. I will supply copies during the
9 recess so that you will have them.

10 The second group of documents now to follow
11 pertain to the period approximately from September
12 1939 to July 1940, when the cabinets of General ABE
13 and Admiral YONAI followed consecutively the cabinet
14 of HIRANUMA. It will be shown that no collaboration,
15 not even a friendly relation, existed between Japan and
16 Germany at that time; that the Japanese Government
17 endeavored hard to come to an understanding with the
18 Anglo-Saxon countries. However, lack of any reciprocating
19 attitude on the part of the U.S.A. and the world
20 situation at that time, war in Europe, doomed this
21 policy to failure.

22 I first call the Court's attention to defense
23 exhibit 2272, transcript page 16,240-16,242, KIDO's
24 Diary of 28 August 1939, to show that the ABE Cabinet
25 was born with the Imperial order to adopt a friendly

1 foreign policy to Great Britain and the United States.
2 The Emperor instructed Premier ABE, upon bestowing
3 Imperial Order to form a new Cabinet, that 'Diplomatic
4 policy should follow the line of cooperation with
5 Britain and the United States' (transcript page 16,241,
6 Line 23 to 24). That is a prosecution exhibit.

7 I now offer in evidence defense document
8 No. 246, a statement of ABE Cabinet, dated 4 September
9 1939, to show that the Japanese Government made clear
10 by this statement that it had abandoned the pro-Axis
11 policy.

12 THE PRESIDENT: Admitted on the usual terms.

13 CLERK OF THE COURT: Defense document 246
14 will receive exhibit No. 2729.

15 (Whereupon, the document above referred
16 to was marked defense exhibit 2729 and received
17 in evidence.)

18 MR. CUNNINGHAM (reading): "STATEMENT OF
19 THE JAPANESE GOVERNMENT.

20 "September 4, 1939.

21 "In the face of the European war that has
22 just broken out, Japan intends not to be involved there-
23 in: she will concentrate her efforts on the settle-
24 ment of the China Affair."
25

1 The next document is rather long, your Honor.
2 THE PRESIDENT: We will recess for fifteen
3 minutes.

4 (Whereupon, at 1045, a recess was taken
5 until 1100, after which the proceedings were
6 resumed as follows:)

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1 MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: Mr. Cunningham.

4 MR. CUNNINGHAM: For the benefit of the
5 interpreters and so on, document No. 206-G hasn't
6 arrived up through the processing yet and therefore
7 I have to put it on later together with document 1635
8 and 1400 E-3. They will have to be deferred because
9 all three deal with the same subject matter.

10 I now offer in evidence defense document
11 1400 D-3, a further excerpt from "Foreign Relations of
12 the United States" which is a telegram of Ambassador
13 Grew to the Secretary of State, dated 18 December 1939,
14 concerning a conversation between Ambassador Grew and
15 Foreign Minister NOMURA on that date, to show that the
16 Japanese Government decided to reopen a part of the
17 Yangze River for navigation for the purpose of improv-
18 ing the Japanese-American relations. Foreign Minister
19 NOMURA handed a memorandum to Ambassador Grew in which
20 it was stated that, if the American Government did not
21 reciprocate to this Japanese effort, Japanese-American
22 relations would undergo a grave set back.

23 THE PRESIDENT: Admitted on the usual terms.

24 MR. CUNNINGHAM: I only propose to read
25 point two on page three.

CLERK OF THE COURT: Defense document
No. 1400 D-3 will receive exhibit No. 2730.

(Whereupon, the document above referred
to was marked defense exhibit No. 2730 and
received in evidence.)

MR. CUNNINGHAM: I was cut off by the light --
point two on page three, and starting "With special
reference" on page five down to the end. (Reading):

"2. The second point I should like to mention
is the problem of navigation of the Yangtze River which
has long been under consideration by the Japanese
military. It is the intention of the military to open
the lower reaches of the Yangtze River as far as
Nanking. While military operations continue in that
area, and opening of the river will cause various
difficulties and inconveniences, it is possible grad-
ually to moderate military requirements. Moreover,
with the inauguration of the period for gradual build-
ing up of China, it is the intention of the military
to open up a portion of China despite the military
inconveniences which will have to be endured. However
in dealing with the opening of the military (river)
to navigation, consideration must be given to the
need for consolidating various military establishments
in that area and to the continued carrying on of

1 military operations even at the present time along
2 the banks of the river as far as Nanking, not to men-
3 tion the upper reaches of the river; it therefore
4 follows that there will be restrictions based upon
5 military necessity. However, these restrictions should
6 gradually be relaxed with the passage of time.
7 While it is desired to effect the opening of the river
8 as early as possible in order to prevent any disturb-
9 ances to the economic life of the area and to forestall
10 any adverse effects upon the building up of the area,
11 it is a matter (sic) anticipated, in the light of the
12 preparation mentioned above and the necessity of con-
13 sultation with various powers, that about two months
14 will be required. The matter of the Pearl River is
15 also being considered along the above lines."

16 And then down to the opposite page -- page
17 five. (Reading):

18 "With special reference to the questions of
19 reopening the Yangtze River, the view is held in cer-
20 tain quarters that the Japanese forces having made
21 enormous sacrifices to reopen the river after it had
22 been closed by the Chinese, no obligation rests on the
23 Japanese to throw the river open to all. Consequently,
24 as above stated, if at a time when progress is being
25 made toward the adjusting of pending questions and

1 concrete preparations are being made for the throwing
2 open of the Yangtze River, no effective results are
3 seen from the standpoint of improving international
4 relations, the Government would be attacked by public
5 opinion. In such contingency, adverse criticisms and
6 attacks would certainly arise not only in connection
7 with the reopening of the river but with the settle-
8 ment of other pending questions, and difficulties would
9 develop in putting such plans of settlement into effect.
10 The result would be that relations between Japan and
11 the United States, instead of improving would, it is
12 feared, (tend toward the opposite direction and so pro-
13 ceed to a point which it would be difficult to estimate.
14 I earnestly hope that Your Excellency will appreciate
15 these considerations.)"

16 Then to the opposite page -- on the back page.

17 (Reading):

18 "During our conversation on November 4, Your
19 Excellency referred to measures both negative and
20 positive and I recall Your Excellency's observation that
21 'In my view it is possible to bring about a speedy re-
22 versal of public opinion in the United States and there
23 is possibility of improvement in our relations if these
24 measures can be taken immediately.' It is my expecta-
25 tion that the American Government will especially

1 appreciate the fact that the Imperial Government is
2 overcoming innumerable difficulties and as above stated
3 is exerting its utmost efforts with a view to opening
4 the way for improvement in American-Japanese relations,
5 and that the American Government will in the same
6 spirit reciprocate the efforts being put forward on
7 our side. It goes without saying that more than anything
8 else the termination of the Treaty of Commerce and
9 Navigation casts the darkest shadow over American-
10 Japanese relations. There remains but a little more
11 than one month before the treaty expires. On the occasion
12 of our previous conversation I said I personally
13 hope that if it is to be that the treaty must expire,
14 commerce between the two countries may continue in a
15 normal manner so that there may occur nothing which will
16 cause the peoples of the two countries to be penalized.
17 To meet this situation some means must be devised;
18 formalities of various kinds must first be taken, but
19 we cannot afford to postpone due to the time required
20 for these formalities and nearly (other) related
21 matters. I therefore believe that there is need for
22 arranging to enter into negotiations before the
23 Christmas holidays begin and request Your Excellency's
24 consideration of this point." Signed "Grew."

25 I next offer in evidence defense document

No. 1400 C-3, an excerpt from "Foreign Relations of the United States, Japan 1931-1941," a telegram from Grew to Hull dated 20 December 1939, to show that the American Government was not ready to respond to the initiative taken by the Japanese Foreign Minister as shown by the foregoing document.

THE PRESIDENT: Admitted on the usual terms.

CLERK OF THE COURT: Defense document No. 1400-C- will receive exhibit No. 2731.

(Whereupon, the document above referred to was marked defense exhibit No. 2731 and received in evidence.)

THE PRESIDENT: Mr. Hull to Mr. Grew.

MR. CUNNINGHAM: (Reading):

"The Secretary of State to the Ambassador in Japan (Grew) Washington, December 20, 1939 - 7 p.m."

Skipping the rest of the formal parts.

"The Department has given careful study to the telegrams under reference. The Department concurs in your view that it would not be advisable in response to the initiative taken by the Japanese Minister for Foreign Affairs to return a categorical negative which would serve to close the door to further discussions and to discourage the efforts of the Japanese Government. At the same time we are not in position to

commit ourselves now to entering upon a negotiation.

1 We are inclined to feel that the negotiation of a new
2 treaty with the thought of holding ratification of
3 such treaty in abeyance until the Japanese Government
4 should have carried out certain assurances would be
5 likely to produce more potentialities of misunderstanding
6 and of disadvantages than would a treatyless condition.
7 We are receiving numerous inquiries with regard
8 to the effect which termination of the treaty will have
9 upon relations between the United States and Japan. To
10 those inquiries we are replying that the absence of a
11 commercial treaty does not of itself cause an interruption
12 in commercial relations; that in such circumstances
13 those relations are governed in each country by its
14 municipal law or practice, subject, of course, to any
15 applicable principles of international law; that in
16 the opinion of the Department the expiration of the
17 treaty of 1911 with Japan will not produce of itself
18 any change in the general customs duties or treatment
19 applicable to imports of Japanese goods into the United
20 States; and that, similarly, there does not appear
21 reason to expect that the termination of the treaty
22 will produce of itself any marked changes in the general
23 customs duties or treatment applicable in Japan to
24 imports from the United States.
25

1 "With regard to the proposal made by the
2 Minister for Foreign Affairs that a modus vivendi be
3 entered into, we prefer to leave our attitude toward
4 that proposal open for the time being. We shall give
5 the matter consideration but wish you to know that our
6 tentative thought is that any modus vivendi which might
7 upon further study commend itself to us under existing
8 circumstances would have to be of a very limited scope
9 to relate principally to rights of establishment and
10 not of trade, and to be of a character which would
11 leave this Government free to impose restrictions upon
12 trade in case developments should make such course
13 appear necessary toward better safeguarding American
14 interests.

15 "The Department is hoping to be able to send
16 you tomorrow in continuation of the above a suggested
17 text of a statement which we feel you might helpfully
18 make orally to the Minister for Foreign Affairs."

19 Signed "Hull."

20 I now offer in evidence defense document
21 No. 1631, an official document of the Japanese Foreign
22 Office, minutes of conversation between NOMURA and
23 Grew on 22 December 1939, to show that the United States
24 of America did not reciprocate to the aforementioned
25

1 Japanese endeavours for improving the Japanese-United
2 States relations, and turned down the Japanese proposal
3 to conclude at least a modus vivendi in case of
4 expiration of the Commercial Treaty, thus placing the
5 Japanese Government in a very difficult position in
6 face of growing public irritation in Japan. I shall
7 not read the appendices.

8 THE PRESIDENT: Admitted on the usual terms.

9 CLERK OF THE COURT: Defense document No.1631,
10 will receive exhibit No. 2732.

11 (Whereupon, the document above re-
12 ferred to was marked defense exhibit No. 2732
13 and received in evidence.)

14 MR. CUNNINGHAM: (Reading):

15 "The Fourth Conversation in Tokyo Concerning
16 the Question of Concluding a New Treaty of Commerce.
17 (At the official residence of the Minister, about one
18 hour from 5:30 p.m., 22 December 1939.)

19 "First of all Ambassador Grew stating that he
20 appreciated the efforts on the part of Japan for the
21 improvement of Japanese-American relations, and that,
22 as to the proposal made by Japan during the last con-
23 versation, the United States Government had prepared
24 a statement clarifying its standpoint for the information
25 of the Japanese Government, handed over an unofficial

1 document as attached hereto (see Appendix A) to Minister
2 NOMURA. This statement points out that the American
3 Government considers the principle of equality of
4 commercial rights and opportunity to be the fundamental
5 condition for concluding a new commercial treaty, and
6 that the establishment of such a principle is a pre-
7 requisite to the conclusion of a commercial treaty.
8 In this connection the statement declares not only the
9 policies and practices of the other party, but also the
10 treatment of Americans in third countries under its
11 influence are called into question, and as at present
12 there exist in territories under Japanese occupation
13 various restrictions on commerce, residence, travel,
14 etc., rendering imperative the practice of equality
15 of treatment for American commercial rights and inter-
16 ests, this constituted an obstacle to the conclusion
17 of a new treaty."

18 THE PRESIDENT: Rendering inoperative.

19 MR. CUNNINGHAM: Well, as corrected. Did you
20 say inoperative or impossible?

21 THE PRESIDENT: Inoperative.

22 MR. CUNNINGHAM: (Reading):

23 "Regarding the statement, the Ambassador added
24 that he hoped various assurances given to the United
25 States by former Foreign Ministers would be carried into

1 effect. Then the Ambassador stated that as regards
2 the conclusion of a provisional modus vivendi the
3 American Government proposed that the question be left
4 open for the time being, and that according to the
5 views of the American Government it would be appropriate
6 to continue the discussions which had been going on
7 between Minister NOMURA and Ambassador Grew concerning
8 various questions to be considered in connection with
9 the conclusion of a new commercial treaty or agreement
10 (see Appendix B). The Ambassador stated further that
11 with regard to the 10% ad valorem duties to be imposed
12 as provided by the Tariff Act of 1913, on goods carried
13 by Japanese ships which enter United States ports, the
14 Treasury Department would soon instruct the customs
15 collectors not to collect such duties until further
16 orders had been issued, and as to the levying of dis-
17 criminatory tonnage dues on Japanese ships, the Depart-
18 ment of Commerce would adopt similar measures (see
19 Appendix C).

20 "In reply to this, Minister NOMURA said that
21 although he appreciated the measure which the United
22 States was going to take to keep Japanese-American trade
23 in a normal condition in spite of the expiration of the
24 treaty, a commercial treaty is not only concerned with
25 foreign trade but also has a bearing on general relations;

1 that from the viewpoint of stabilizing the relations
2 between the two countries he desired the United States
3 to reconsider the question of the conclusion of a pro-
4 visional modus vivendi. As Ambassador Grew asked for
5 an unofficial document, saying that he wished to trans-
6 mit this correctly to his home government, the document
7 as shown in Appendix D was sent to him afterwards.

8 "Then upon Minister NOMURA's question as to
9 the American attitude towards the "right of establish-
10 ment," Ambassador Grew replied that he was not in a
11 position to answer the question.

12 "Lastly, Ambassador Grew referred to the re-
13 cent conversations between YOSHIZAWA and Dorman and,
14 after saying that Washington knew of the fact that
15 Japan had prepared a draft of a modus vivendi, promised
16 to report the results of the conversation to his home
17 Government.

18 "As for the question of the press release,
19 Ambassador Grew expressed his wish to publish only to
20 the effect that the conversation had been continued with
21 a constructive attitude for the improvement of Japanese-
22 American relations and that some progress had been
23 achieved, and to refrain from publishing the matter
24 concerning the 10% ad valorem duties, tonnage dues, etc.,
25 to which Minister NOMURA agreed."

1 I now offer in evidence defense document 259,
2 Address of Prime Minister of the new Cabinet, Admiral
3 YONAI, at the 75th Session of the Japanese Diet on
4 1 February 1940, to show that the YONAI Cabinet also
5 adopted the same foreign policy as the ABE Cabinet
6 of non-intervention in the European war.

7 THE PRESIDENT: Brigadier Nolan.

8 BRIGADIER NOLAN: May it please the Tribunal,
9 this document, No. 259, was offered in evidence before
10 this Tribunal and rejected at page 21,817 of the record.
11 The basis of the objection was that the document was
12 full of political platitudes and had no probative value.
13 For the most part it sets out the course of action
14 which, according to the speech, Japan intends to follow.
15 On occasions the Tribunal has admitted speeches made
16 by prime ministers and foreign ministers, but on every
17 occasion the test has been the probative value of the
18 document itself, and on this occasion I submit that
19 there is none.

20 MR. CUNNINGHAM: Your Honors, I forgot to men-
21 tion that only the statement on the bottom of page 2
22 is all that relates to this matter and that is all
23 I expect to read.

24 THE PRESIDENT: What do you mean by the state-
25 ment at the bottom of page 2? The whole of the

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3 YONAI, at the 75th Session of the Japanese Diet on
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21 tion that only the statement on the bottom of page 2
22 is all that relates to this matter and that is all
23 I expect to read.

24 THE PRESIDENT: What do you mean by the state-
25 ment at the bottom of page 2? The whole of the

paragraph --

1 MR. CUNNINGHAM: That whole paragraph on the
2 bottom of page 2. Oh. Perhaps you have a different
3 copy than I have.

4 THE PRESIDENT: Do you object to that part,
5 Brigadier?

6 BRIGADIER NOLAN: May it please the Tribunal,
7 I do object because it so well expresses the point of
8 view that I have been endeavoring to put to the
9 Tribunal, that it is merely a declaration of intention
10 to do something, and, in our submission, the Tribunal
11 is concerned only with what was, in fact, done.

12 THE PRESIDENT: We have been more liberal
13 in dealing with speeches by one of the accused.

14 By a majority the objection is upheld and the
15 document rejected.

16 MR. CUNNINGHAM: I now offer in evidence
17 Defense document 1645, an official document of the
18 Japanese Foreign Office, which is the protest of the
19 Japanese Government to the British Government on the
20 Asama-Maru Incident, dated 13 January 1940, to show
21 that Great Britain took German passengers from the
22 Japanese liner Asama-Maru returning from the United
23 States of America to Japan in the waters near Tokyo
24 Bay, in violation of the international law, and evoked
25

1 strong protest from Japan, creating bad will and
2 virtually committing an act of war.

3 THE PRESIDENT: Brigadier Nolan.

4 BRIGADIER NOLAN: May it please the Tribunal,
5 this is another statement by a foreign office spokes-
6 man, the majority of which have been rejected by the
7 Tribunal. These statements which are produced in
8 English are merely prepared for consumption at home
9 and abroad through the medium of the domestic and
10 foreign press. We submit that this is not the proper
11 method in which to prove the facts of this alleged
12 incident.

13 MR. CUNNINGHAM: I submit, your Honor, that
14 there is no opinion or anything else in this document.
15 It is a mere statement of the Japanese Government in
16 protest and this is the usual manner in which public
17 protests are made in international relations, and I
18 do not see how we could better the evidence than to
19 give the official protest issued by the Japanese Govern-
20 ment through their official spokesman.

21 THE PRESIDENT: How is it relevant?

22 MR. CUNNINGHAM: Well, if your Honor please,
23 the prosecution has made great weight of the Ladybird
24 and the Panay as acts of war and as overt acts, and
25 certainly there are reciprocating provocations which

1 cause international rift and disruption of relations,
2 and this is an off-setting incident which is of the
3 same nature as the Ladybird and the Panay.

4 THE PRESIDENT: By a majority, the objection
5 is upheld and the document rejected.
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1 MR. CUNNINGHAM: I now offer in evidence
2 defense document No. 1452 and No. 221, official docu-
3 ments of the Japanese Foreign Office which are the
4 explanations of the Asama Maru Incident by Foreign
5 Minister ARITA in the 70th Session of the Diet on
6 the 1st and 6th of February, 1940, to show the strong
7 public indignation in Japan caused by the Asama Maru
8 Incident, giving stimulus to the anti-British feelings
9 in Japan.

10 THE PRESIDENT: Brigadier Nolan.

11 BRIGADIER NOLAN: If it please the Tribunal,
12 the prosecution objects to the two documents just
13 referred to, No. 1452 and No. 221. If this were the
14 result of an investigation or if it were a report by
15 someone authorized to make a report, it would be in a
16 very different position. But here we find a speech
17 delivered by a parliamentarian in the Diet, giving his
18 views and opinions on what will be a deterioration in
19 the feelings of the Japanese people towards Great
20 Britain.

21 In addition, it deals with a matter which has
22 not been raised by the prosecution in this case, and
23 is an incident that bears no relationship and has no
24 similarity with the incidents of the Ladybird and the
25 Panay.

1 The prosecution submits that the documents
2 should be rejected.

3 THE PRESIDENT: Mr. Cunningham.

4 MR. CUNNINGHAM: If your Honors please, the
5 objection seems to have several defects, but the first
6 is that I don't know anyone who could speak more
7 authoritatively on the Japanese position than the
8 Minister ARITA at the time.

9 On the second proposition, it is misunder-
10 standings between nations which causes wars and cer-
11 tainly the mere fact that the prosecution did not raise
12 this question does not preclude us from setting it up
13 as a mitigating circumstance or as an affirmative
14 defense.

15 On the third proposition, it does not require
16 shooting to bring about alienation of affection in
17 international feeling.

18 THE PRESIDENT: It seems to me to be covered
19 by the decision on the previous document, Mr. Cunningham;
20 but my colleagues may think otherwise.

21 MR. CUNNINGHAM: Well, I understood that the
22 objection on the other was the defect in the certifi-
23 cation or the source of the document; but there
24 certainly could be no objection to the source of this
25 information.

1 THE PRESIDENT: By a majority, the objection
2 is upheld and the document rejected.

3 MR. CUNNINGHAM: I now call the Court's
4 attention to prosecution exhibits 1285, 1286 and 1287,
5 transcript pages 11,675 to 11,680, concerning Foreign
6 Minister ARITA's statement on the status of the Nether-
7 lands East Indies and subsequent exchange of opinions
8 with Holland, Britain, France and America, between
9 13 and 16 May 1941, which show conclusively that the
10 Japanese policy of maintaining and respecting the status
11 quo of the N.E.I. was fully approved by the said
12 countries.

13 I only propose to read the first paragraph and
14 other marked parts -- to refer to parts that were not
15 read by the prosecution. No -- I don't propose to read
16 any of the document, just call attention to it.

17 I now call the Court's attention to prosecution
18 exhibits 517 and 518, transcript pages 6157 to 6160,
19 telegrams exchanged between Ribbentrop and Ott on
20 22 and 23 May 1940, which show conclusively that with
21 respect to ARITA's statement on the status of the
22 Netherlands East Indies, Germany did not express her
23 attitude until specifically asked by Japan, her answer
24 arrived later than that of other governments, and that
25 Germany did not commit anything in favor of Japan.

1 This shows that no collaboration did possibly exist
2 between Japan and Germany at that time.

3 I do not propose to read any of it, just refer
4 to it.

5 I next call the Court's attention to prosecu-
6 tion exhibit No. 521, transcript pages 6166 to 6168,
7 memorandum signed by Wiehl, director of the Economic
8 Department of the German Foreign Office, dated 20 June
9 1940, which shows that Germany was dissatisfied with
10 Japan's attitude with respect to the economic relations
11 with Germany and was not favorably disposed to Japan's
12 request concerning the French Indo-China question.

13 I now offer in evidence defense document
14 No. 1636, a telegram from Ambassador Mackensen in Rome
15 to the German Foreign Office, dated 27 May 1940, to show
16 that the visit of Ambassador SATO to Berlin in June of
17 1940 was only unofficial and incidental and no official
18 mission was given to this visit.

19 This document is presented in rebuttal of
20 prosecution's exhibits No. 524, 525 and 526, 1020 and
21 1021, concerning conversation, SATO to Ribbentrop.

22 THE PRESIDENT: Admitted on the usual terms.

23 CLERK OF THE COURT: Defense document 1636 will
24 received exhibit No. 2733.

25 (Whereupon, the document above

referred to was marked defense exhibit
No. 2733 and received in evidence.)

MR. CUNNINGHAM: Omitting the formal parts:

"Ambassador SATO told me on his visit of today, that he would accept gladly the invitation of the German Government with four accompanists of the Japanese Foreign Office and director and other representatives of the Manchurian Aircraft Company -- name will subsequently sent by letter -- and come to Germany after the conclusion of the trip in Italy, with the polite reservation that if the development of the near future with respect to the difficulties of his homeward travel should not compel him to change his plans.

"(SATO said that) He can come to Germany only as a private man, because his highly official mission in Italy in response to the equally highly official Italian mission in Japan will find the end in Venice. He asks therefore not to make in Germany any official reception with company of honour and similar things. My suggestion to place from the German side some accompanists at his disposal he took up with thanks. We agreed that he will be treated as Etranger de distinction (foreigner of distinction).

"Departure will not be before 14 June, because SATO will probably go back from Venice to Rome for the

1 signing of a commercial treaty. The length of stay
2 in Germany will be from 5 to 7 days. SATO repeated
3 the wish to make acquaintance with the German Foreign
4 Minister and to see the Secretary of State Weiszacker,
5 whom he knew from Geneve, but he emphasized that he
6 has full understanding, if the German Foreign Minister
7 could not receive him under the present circumstances.
8 He will be thankful if he could make some sightseeings,
9 but he will leave everything to the discretion of the
10 German Government.

11 "Director of the Manchurian Aircraft Company,
12 who will accompany SATO, is already in direct contact
13 with the corresponding German authorities.

14 "SATO, who leaves Rome on 28 May, can be reached
15 through me and the Japanese Embassy here."

16 Signed "Mackensen."

17 I now call the Court's attention to prosecution'
18 exhibits No. 525, 526 and 1020, transcript pages
19 6186 to 6190, and transcript pages 9694 to 9703, tele-
20 grams exchanged between Ambassador SATO and Foreign
21 Minister ARITA on the conversation of the former with
22 Ribbentrop on 9 July 1940, which show that no results
23 were obtained by this conversation. No collaboration
24 between Japan and Germany.
25

I want to read page 4 of exhibit 1020.

Have you the documents?

1 THE PRESIDENT: Yes, we have them. Thank you.

2 MR. CUNNINGHAM: (Reading) "As you will
3 understand from what I report with this cable, I
4 could not find any definite attitude on German side
5 as shown by Italian premier regarding Dutch East Indies
6 and French Indo-China. It is also a great regret that
7 I could not get any promises or pledges and on the
8 contrary it was observed that German side rather avoided
9 to give definite previous promises to these problems.
10 As there was a wish from the German side, I hope you
11 would pay attention not to have the contents of this
12 telegram be leaked outside.
13

14 "Cabled the same to Italy, the United States,
15 Soviet Union and Britain."
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1 I now call the Court's attention to the prosecu-
2 tion's exhibit No. 545, transcript page 6285 to 6292,
3 outline of conversations between MATSUOKA and Ott,
4 dated 1 August 1940, and read the part which was not
5 read by the prosecution to show that Ott was very much
6 dissatisfied with the unfriendly treatment he received
7 from the Japanese Foreign Office. Again no collabora-
8 tion between Japan and Germany.

9 I will read page 4 (last paragraph) and 5.

10 Read in the light of the evidence of Zorge
11 influence and other evidence offered, Ott's situation
12 would be more understandable.

13 Page 5:

14 "And Ambassador Ott said 'Since I have
15 arrived here as Ambassador to Japan, what I had felt
16 has been entirely unpleasant. Until now KASUMI-
17 GASEKI has disregarded Germany and never given settle-
18 ments to the question German Embassy had turned over.
19 For some of them, even a reply has not been given.
20 This may be sufficient reason to be called back home
21 by my government. And you have never given me the
22 chance to see you except on business and I have been
23 treated inferior to British and the United States
24 Ambassadors: I take this for an unendurable insult.
25 In spite of such conditions the German Government has

1 still a little hope in me and has not called me back
2 home till today.'"

3 The following third group of witnesses and
4 documents will show that the motives of the Japanese
5 Government in concluding the Tripartite Pact on 27
6 September 1940, and the purpose of that Pact as inter-
7 preted by the Japanese Government, were peaceful and
8 purely defensive, and Germany also assured Japan of
9 her peaceful intention during the negotiations for the
10 Pact. It will further be shown that the Tripartite
11 Pact is entirely different from the abortive treaty
12 negotiated in 1938 and 1939 by the HIRANUMA Cabinet.
13 These in rebuttal of the prosecution's charge that the
14 Pact was concluded as a means of dominating the world
15 by Japan, Germany and Italy, and that the Pact was the
16 final stage of the continuous collaboration between
17 the three countries since 1936.

18 I first call witness Heinrich Stahmer, the
19 former ambassador of Germany to Japan, who could be
20 considered as one of the best living authorities on
21 Japanese-German relations. As Mr. Stahmer will go back
22 to Germany soon and will not be able to be a witness
23 in the Individual Phase, I wish, with the Court's per-
24 mission, to ask him also questions pertaining to another
25 matter that probably shouldn't be mentioned now.

1 I call Witness Stahmer who is in my office.

2 MR. TAVENNER: If the Tribunal please, we have
3 not received a copy of the affidavit. It has not been
4 served on the prosecution.

5 THE PRESIDENT: Well, if we adjourn now you
6 will have an opportunity to peruse it before the after-
7 noon. Will that be satisfactory?

8 MR. TAVENNER: If your Honor please, this is
9 an affidavit I think we should have the rule complied
10 with, the twenty-four hour rule.

11 MR. CUNNINGHAM: Well, your Honor, the affidavit
12 has been completed for three, four, five or six days,
13 and it is just the fault of the machinery and not my
14 fault.

15 THE PRESIDENT: Still the rule must be complied
16 with. It was applied as against the prosecution.

17 MR. CUNNINGHAM: May I suggest, your Honor,
18 that this witness speaks perfect English. There is
19 no reason why he shouldn't testify in English. There
20 is no reason why he should have an affidavit except
21 for convenience purposes.

22 THE PRESIDENT: The Judges like to have an
23 advance copy of the proposed evidence, too. We were
24 served in time.

25 The marshal assures me that he doesn't know

1 the German form of oath which you promised him, Mr.
2 Cunningham.

3 MR. CUNNINGHAM: I miscalculated five minutes.
4 I expected to get him that in the noon hour.

5 THE PRESIDENT: Well, we can't take this
6 witness' evidence before tomorrow.

7 Mr. Comyns Carr.

8 MR. CUNNINGHAM: Well, now, your Honor, the
9 order of proof is all made up, and certainly it appears
10 to me that we shouldn't put a stop watch on this matter
11 just for technical reasons. I can't go on with my
12 proof very well under the circumstances because these
13 documents have been processed and published, and it is
14 certainly a detail as far as I am concerned.

15 THE PRESIDENT: We can't give you a privilege
16 not extended to others, Mr. Cunningham. All counsel
17 are equal before us.

18 MR. CUNNINGHAM: Well, does your Honor wish
19 to postpone this matter, the whole process, until
20 twenty-four hours has expired?

21 This witness should not have to testify by
22 affidavit at all. It is only a matter of convenience.
23 He is an English-speaking witness and he is exempted
24 from the affidavit rule.

25 THE PRESIDENT: I have had the advantage of a

1 discussion with all my colleagues on this matter, and
2 they would like to know in advance what evidence is to
3 be given, and, of course, therefore, the affidavit
4 rule must be applied. In its terms it does not dis-
5 tinguish between English-speaking witnesses and others.

6 MR. CUNNINGHAM: Your Honor, I understood
7 your discussion with Mr. Logan in chambers specifically
8 excepted English-speaking witnesses and European wit-
9 nesses, if my memory is correct.

10 THE PRESIDENT: That is so. Subsequently I
11 discussed the matter with my colleagues who prefer to
12 know in advance what the witness is going to say.

13 MR. CUNNINGHAM: Well, I don't want to be
14 technical about it, and I don't want to delay the process
15 any. I would like to have this witness testify first,
16 and I have about 150 or 200 questions to ask him in
17 addition to his affidavit.

18 But still in order that his testimony will be
19 continuous and logical and so on, I will call my second
20 witness who was supposed to come after Mr. Stahmer,
21 Mr. SAITO.

22 THE PRESIDENT: Mr. Tavenner.

23 MR. TAVENNER: If the Tribunal please, I would
24 like to offer a protest now to counsel's declared inten-
25 tion of interrogating the witness to the extent of one

1 discussion with all my colleagues on this matter, and
2 they would like to know in advance what evidence is to
3 be given, and, of course, therefore, the affidavit
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17 addition to his affidavit.

18 But still in order that his testimony will be
19 continuous and logical and so on, I will call my second
20 witness who was supposed to come after Mr. Stahmer,
21 Mr. SAITO.

22 THE PRESIDENT: Mr. Tavenner.

23 MR. TAVENNER: If the Tribunal please, I would
24 like to offer a protest now to counsel's declared inten-
25 tion of interrogating the witness to the extent of one

1 hundred and some questions.

2 THE PRESIDENT: Well, my colleagues are insis-
3 tent that the rule must be complied with, so that we
4 cannot take the evidence today of this witness.

5 And they are all against, including myself,
6 extensive questioning in addition to the affidavit.
7 Where, say, through some inadvertence the affidavit
8 isn't as full as it might be, then we may allow a
9 question or two in addition, and, indeed, we have done
10 so.

11 MR. CUNNINGHAM: Well, your Honor please, the
12 testimony of the witness does not lend itself to affi-
13 davit form, and, therefore, I have prepared the questions
14 and answers written for the witness and all he has to
15 do is read them, if necessary, which I think is highly
16 improper, but as I have the questions and answers all
17 written out and processed that he can read after he gets
18 through with his affidavit, the questions and answers
19 follow logically after the affidavit. But I couldn't--

20 THE PRESIDENT: Which completely disposes of
21 the rule against leading questions in the court itself.

22 You needn't say anything more, Mr. Tavenner.
23 You are only wasting time. We are determined that the rule
24 shall be observed.

25 We will adjourn until half past one.

24,237

(Whereupon, at 1200, a recess was taken.)

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The Tribunal met, pursuant to recess, at 1330.

MARSHAL OF THE COURT: The International
Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Mr. Cunningham.

MR. CUNNINGHAM: If the Tribunal please, I
wish to state that the change in the order of witnesses
totally disrupts the order of proof. The reason the
affidavit was not distributed in English is because
there is a rule downstairs that the prosecution will
not receive the English copy until the Japanese copy
is ready for distribution, and the English copies
have been ready for a week. I just state that be-
cause it looks like a ridiculous situation.

MR. TAVENNER: If the Tribunal please, counsel
is certainly misinformed about the rule that he spoke
of. Since early in the first week of the defense phase,
I gave positive instructions never to hold up delivery
because of the absence of Japanese copy. I have
checked on that numerous times, and I have never found
an instance in which that has been done so far.

MR. CUNNINGHAM: I do not propose to make an
issue of it. I merely asked why it was not distributed
when they had it so long, and they told me that the

SAITO

DIRECT

1 reason it was not distributed was that the Japanese
2 translation was not complete for distribution, and I
3 specifically had to go to the prosecution document
4 section to get a waiver of that rule in order to get
5 a few documents beforehand.

6 I would like to call now a witness, SAITO,
7 Ryoei, Advisor to Foreign Minister MATSUOKA at the
8 time of the conclusion of the Tri-Partite Pact,
9 affidavit No. 1592.

10 - - -

11 R Y O E I S A I T O, called as a witness on behalf
12 of the defense, being first duly sworn, testi-
13 fied through Japanese interpreters as follows:

14 DIRECT EXAMINATION

15 BY MR. CUMMINGHAM:

16 Q Will you state your name and your address,
17 please?

18 A My name is SAITO, Ryoei, and my address is
19 Tokyo, Shibuya-ku, Shoto No. 42.

20 Q I ask the Marshal to hand you the document
21 marked defense document 1592, and I ask you if that
22 is your affidavit?

23 (Whereupon, a document was handed
24 to the witness.)

25 A There is no doubt it is my affidavit.

SAITO

DIRECT

1 Q Are the statements contained therein true
2 and correct as you verily believe?

3 A I believe the contents are accurate and
4 truthful.

5 MR. CUNNINGHAM: I offer in evidence defense
6 document No. 1592, the affidavit of SAITO.

7 THE PRESIDENT: Mr. Tavenner.

8 MR. TAVENNER: If the Tribunal please, ob-
9 jection is made to the introduction of this affidavit
10 in its entirety. The Tribunal may recall the defense
11 document 1113, which was rejected at page 22,555,
12 consisting of twenty-eight pages of argument, which
13 the Tribunal rejected in entirety.

14 This affidavit, of course, relates to a differ-
15 ent subject matter, but it is open to the same general
16 objections. This is a statement of opinions and con-
17 clusions of the witness; and, to the extent that it ex-
18 presses conclusions of his or MATSUOKA's, it is in-
19 vading the province of the Tribunal. It is an out-
20 standing example of prolixity and argument which the
21 Tribunal has consistently criticized and upon which it
22 has acted in disallowing evidence of this type.

23 More specifically, paragraph 2 on page 2 is
24 a statement of the witness' conception of MATSUOKA's
25 general idea regarding peace of the world, which seems

SAITO

DIRECT

1 to be based on alleged conversations with MATSUOKA when
2 he was President of the South Manchurian Railway Company.

3 Paragraph 3, on page 3, attempts to express
4 MATSUOKA's motives in deciding to conclude the Tri-
5 Partite Pact. These expressions of the witness' views
6 of the motive of MATSUOKA, we think, are inadmissible.

7 Paragraph 4, on page 4, is a statement of the
8 witness of what MATSUOKA considered and the witness'
9 version of MATSUOKA's ideals, opinions, and thoughts.
10 It is followed by a statement of what MATSUOKA did
11 not tell the witness and a statement of what MATSUOKA,
12 in the witness' opinion, did not intend to do.

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1 Paragraph five on page six is a recital of
2 the witness' opinion as to Japanese motives and what
3 Japan thought which, we submit, is clearly an inva-
4 sion of the province of the Tribunal.

5 In the paragraph on the top of page 7 an
6 order relating to the China Incident is referred to,
7 the absence of which is neither explained nor ac-
8 counted for.

9 On page 8 is an argument by the witness
10 based on the witness' consideration of what MATSUOKA
11 thought about American intervention.

12 Paragraph numbered 6, beginning at the bottom
13 of page 8 and extending through page 10, is an argu-
14 ment relating to encirclement, and it is called
15 "Shaking Hands with Some Powers."

16 Paragraph seven on page 11 is a statement by
17 the witness as to what MATSUOKA thought of Japan
18 shaking hands with the USSR, based on another alleged
19 conversation with MATSUOKA when he was President of
20 the South Manchurian Railway Company.

21 The witness' statement contained in the
22 paragraph at the top of page 12 is irrelevant and
23 immaterial to any issue and, even if true, proves
24 nothing.

25 Paragraph eight begins with the statement

SAITO

DIRECT

1 that the Tri-Partite Pact was not concluded in
2 preparation for war. This, we submit, is a conclu-
3 sion which invades the province of this Tribunal.
4 As to alleged reservations which are mentioned in
5 this paragraph marked 8, the treaty and the exchange
6 of letters is the best evidence. Reference is also
7 made to a personal message from Ribbentrop which
8 does not afford anything new as far as the issues
9 in this case are concerned, but the absence of it
10 has neither been explained nor accounted for.

11 In item 9, paragraph No. 9, beginning near
12 the bottom of page 15, we find a recital of what
13 happened at a certain cabinet meeting. We contend
14 that the minutes of the cabinet meeting constitute
15 the best evidence and should be produced for whatever
16 value they have.

17 Item 10 relates to certain alleged state-
18 ments that MATSUOKA made on his trip to Germany.
19 I am in error in that appearing in that particular
20 paragraph. But, at any rate, the records of the
21 particular conference were kept and the minutes of
22 that conference are the best evidence.

23 THE PRESIDENT: If MATSUOKA were alive and
24 went into the box to give evidence, would you object
25 to these statements attributed to him in the affi-

SAITO

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1 davit here. We cannot talk of the evidence being
2 given by the individual because the individual is
3 dead. If the affidavit were confined to a statement
4 of what MATSUOKA would have said, would you object?
5 We certainly cannot have this witness' conclusions.

6 MR. TAVENNER: In most of the instances,
7 if the Tribunal please, in which I have objected to
8 the statements of the witness, they were his conclu-
9 sions based upon alleged conversations that he had
10 with MATSUOKA at some earlier date.

11 THE PRESIDENT: If the affidavit is limited
12 to what MATSUOKA said, would you object?

13 MR. TAVENNER: I do not think that we could
14 object to what he said at the time the negotiations
15 were going on. But, as to what was said when he was
16 President of the South Manchurian Railway Company,
17 quite some years before the incidents involved, they
18 are tied together in a rather ingenious way with
19 the statements of the witness relating to conditions
20 at the time of the negotiation for the pact; and,
21 just as the former affidavit, it is impossible to go
22 through this affidavit and determine with any satis-
23 faction that which is not opinion and conclusions.
24 It invades the province of the Tribunal and consti-
25 tutes, also, opinion testimony. For that reason, we

1 object to the introduction of this affidavit in its
2 entirety.

3 THE PRESIDENT: Mr. Cunningham.

4 MR. CUNNINGHAM: If your Honor please, as a
5 matter of time and a matter of necessity, it is im-
6 possible to revise this affidavit to meet certain
7 requirements that we do not know about now but which
8 might be suggested by the prosecution. We have done
9 our best to comply with the Court on this affidavit.
10 This man was the legal adviser to Mr. MATSUOKA when
11 he wrote the Tri-Partite Pact, and I believe that
12 all the considerations which went into that Tri-
13 Partite Pact were known by this man. There is noth-
14 ing to prevent the Tribunal from eliminating from its
15 consideration the opinions and conclusions as they
16 did in the prosecution's case with the affidavits
17 prepared by Mr. Helm which were purely legal argu-
18 ments -- by Mr. Darcy.
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1 THE PRESIDENT: But this inclusion in affi-
2 davits of opinions comes many months after the Court
3 has warned against it. The prosecution as far as I
4 recollect did not disregard any warning we gave but
5 we have given this warning repeatedly.

6 MR. CUNNINGHAM: I firmly state, your Honor,
7 that this was not done in any disregard. It was done
8 on account of the physical impossibility with the
9 language difficulty to do any better job, and I don't
10 know how I could do it any better. I have no facilities
11 in Japanese and I only rely on the Japanese counsel
12 to understand the rulings of the Tribunal and to pre-
13 pare the documents accordingly; and once the document
14 is prepared, I feel certain, your Honors, that it
15 would be much simpler if your Honors would disregard
16 the opinions and the conclusions. It is not physically
17 possible for me to revise this and go on with my proof.

18 THE PRESIDENT: Japanese counsel appear to
19 us to be able, scholarly men in most cases and they
20 should understand a simple direction of the Court that
21 we will not allow these opinions to be inserted in
22 affidavits.

23 MR. CUNNINGHAM: I submit, your Honors, that
24 in our judgment they may be on the border line but they
25 are not conclusions. They are statements of facts

SAITO

DIRECT

1 supported by substantial evidence, supported by
2 the record. They are the best statements of fact
3 that we are able to give you and certainly--

4 THE PRESIDENT: We cannot allow them to
5 assume our function of drawing conclusions. The
6 witnesses tell us the facts; we draw the conclusions.

7 MR. CUNNINGHAM: Your Honor, it is not
8 physically possible now to comply with that sort of
9 regulation, and what Mr. MATSUOKA said, whether it
10 was a conclusion or a supported fact, it is significant
11 and important. I can't go on with my proof if the
12 affidavit is rejected. It just makes it necessary
13 to postpone the case until we get this witness'
14 affidavit in form. I can't get out of court and do
15 things like that.

16 THE PRESIDENT: What are we to do with the
17 defense, conducted by able lawyers, if they repeatedly
18 disregard our rulings and if, as a result of our in-
19 sisting upon our rulings being given effect to, the
20 defense case is brought to a standstill? By repeatedly
21 doing that they could prevent this Court, if this
22 Court were foolish enough to allow them to do so, from
23 ever reaching a verdict. This ruling which has been
24 disregarded for months by able lawyers is a simple one,
25 clearly understood by all, and must be observed. If

1 not we may have to close the case and come to a
2 verdict.

3 We want to hear all the individual accused;
4 we want to hear every bit of relevant and material
5 evidence that you have to offer, but we want the case
6 conducted in accordance with our clear, simple rules
7 about the meaning of which nobody is under any mis-
8 apprehension -- nobody, including the defense counsel.

9 MR. CUNNINGHAM: If your Honor please, I
10 have four observations to make upon that which bear
11 right on the point. The first is that it is a physical
12 impossibility to comply with that technical rule with
13 all the resourcefulness and legal ingenuity and ability
14 and education that is at the defense command, espec-
15 ially on this document.

16 THE PRESIDENT: But you asked the Court to
17 apply the rule by editing the affidavit.

18 MR. CUNNINGHAM: On the second point, your
19 Honor, if I may go to my second point, I consider
20 the exclusion of these points in this affidavit as
21 the application of very technical rules of evidence
22 which it is very, very difficult, if not impossible,
23 to comply with.

24 THE PRESIDENT: The exclusion of opinions
25 and conclusions which the Court alone is at liberty

1 to draw is not a technical matter. These witnesses
2 with the collusion of Japanese counsel, so you say,
3 are forming conclusions that we must draw. American
4 counsel see these affidavits with the objectionable
5 conclusions and they do not strike them out but they
6 bring them to us.

7 MR. CUNNINGHAM: On the third proposition,
8 your Honor, as far as being under a misapprehension,
9 I understand perfectly the rule that you are trying
10 to apply, and I have read this affidavit and I have
11 put behind it my best judgment that I can give and I
12 have received the judgment from some of my co-counsel
13 who are working on it and this is the best we can do
14 under the circumstances.

15 THE PRESIDENT: I think the position is well
16 expressed in a note to me from one of the Members of
17 the Court while I have been discussing the question
18 with you: We should reject the document in its present
19 form. The Tribunal cannot undertake to edit this docu-
20 ment so far as excerpting from it (1) the irrelevant,
21 (2) the immaterial, (3) the expressions of opinion,
22 (4) the passages in which the witness swears the issue.
23 That is undertaking our task.
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1 MR. CUNNINGHAM: If your Honor please,
2 if eleven Members of the Court cannot edit the
3 document and eliminate from it the things by hear-
4 ing it and reading it, how can you conceivably
5 ask me or another counsel to read it and pass our
6 judgment upon it? We must do our best, and that
7 is all I can do.

8 THE PRESIDENT: Here for the first time
9 in my experience we have counsel tendering docu-
10 ments which they know cannot be admitted according
11 to the rules we have adopted and asking us to edit
12 them. This is not a case where the admissibility
13 of the particular evidence is in question. No
14 question arises. The evidence is clearly inadmis-
15 sible, and everybody knows it; and yet we are asked
16 to edit the document. We are to make ourselves
17 servants of the parties in the case instead of
18 acting as judges.

19 MR. CUNNINGHAM: My colleagues decide that
20 we ought to stand the witness down. Your Honors, I
21 have done my best with the affidavit, and I hate to
22 have to turn it over to somebody. You must realize
23 it is impossible to present the documents in court
24 and also edit them. I just do not have that kind
25 of time or energy.

THE PRESIDENT: The counsel responsible for

1 these documents are serving their clients badly.
2 It is a hard thing to say about counsel, but the
3 observation is called for.

4 Mr. Tavenner.

5 MR. TAVENNER: If your Honor please, due
6 to the importance of this principle, may I be per-
7 mitted to make an observation.

8 There is a persistent rumor that it will
9 take probably a year yet to complete this case.
10 That rumor emanates from defense sources. We have
11 been told that there would be hundreds of witnesses.
12 Now it would seem to the prosecution that it should
13 be a comparatively simple matter that affidavits
14 should be perused and edited before they are pro-
15 cessed. If we are required to make this type of
16 objection after the processing of documents over
17 the many months that it seems this case may still
18 last, it will prolong this trial many months.

19 THE PRESIDENT: I make no charges. I voice
20 no suspicions, but if the defense wanted to prevent
21 us from ever reaching a verdict this would be the
22 way to do it.

23 MR. CUNNINGHAM: Well, your Honor, on the
24 matter of time, it seems to me that if we read this
25 affidavit and got it out of the way, an

SAITO

DIRECT

1 hour and a half reading it, and got this witness
2 away, it would certainly save time and not lose it.
3 That is the way I look at it.

4 I ask that the witness be stood down and
5 we will redraft the affidavit.

6 THE PRESIDENT: The witness is stood
7 down.

8 (Whereupon, the witness was
9 excused.)

10 MR. CUNNINGHAM: I would like to refer
11 at this stage to defense document 1664, the affi-
12 davit of Admiral OIKAWA, Koshiro, former Minister
13 of the Navy. Although Admiral OIKAWA will be on
14 the witness stand at the later stage of this
15 Pacific phase of the case, item 2 of his affidavit
16 concerns the Tri-Partite Pact, in which he says
17 that the purpose of the pact was to prevent the
18 United States from entering the European War and
19 thereby to stop the devastations of the war from
20 spreading throughout the world. I should like only
21 to read this one paragraph instead of calling the
22 witness here for this purpose at this time because
23 the rest of his testimony is disconnected with this
24 particular item.

25 MR. TAVENNER: I may say, your Honor, that

1 that one paragraph is three or three and a half
2 pages long, probably more than half of the
3 affidavit.

4 MR. CUNNINGHAM: I just want to avoid
5 calling the witness two times or three times to
6 get this one item, and I offer for identification
7 defense document 1664 and only offer to read the
8 one paragraph, item No. 2.

9 MR. TAVENNER: May I be heard.

10 THE PRESIDENT: Mr. Tavenner.

11 MR. TAVENNER: This affidavit, or that
12 half of it, will be presented during a subsequent
13 phase of the case, and it is now requested that we
14 cross-examine at that stage, which is probably the
15 most feasible thing to do, but we think that the
16 affidavit in its entirety should be admitted at
17 that time rather than dividing it, and for that
18 reason we object to the splitting of the document
19 at this time. .

20 MR. CUNNINGHAM: I submit, your Honors,
21 now is the most orderly time to hear the evidence
22 on this particular question, and I should like to
23 have this part of it into the record now and
24 cross-examination can happen later. I might
25 suggest that one of the reasons I want to do this

1 now is that I am not going to be here at the time
2 Admiral OIKAWA is on the stand, and I should like
3 to complete my presentation while I am here.

4 THE PRESIDENT: Well, I am afraid, Mr.
5 Cunningham, the Tribunal is against you on splitting
6 the evidence in this way.

7 MR. CUNNINGHAM: Well, your Honors, several
8 of the counsel wished to have the Navy's view of
9 the Tri-Partite Pact presented at the time the
10 evidence on the interpretation of the Tri-Partite
11 Pact was offered, and that is the reason why I am
12 now asking that it be received.

13 THE PRESIDENT: We will allow you the same
14 concession, necessarily, as we allowed in the case of
15 other witnesses. You may call this man on this
16 particular phase, but he must be cross-examined.
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1 MATSUOKA and Stahmer on 9 and 10 September 1940,
2 which shows the peaceful intention of the both parties
3 in initiating the negotiations. A greater part of
4 this record was incorporated in the Memoir of Prince
5 KONOYE, which will be offered later. I wish to call
6 the Court's attention especially to point 1, 2, 10,
7 and 11, which show the peaceful understanding between
8 the parties.

9 I now call the Court's attention to prose-
10 cution's exhibit No. 550, transcript pages 6329 -
11 6343, MATSUOKA's report on the Imperial Conference
12 for the conclusion of the Tri-Partite Pact, in which
13 MATSUOKA declares that this pact was entirely
14 different in nature to the abortive pact negotiated
15 in 1938-1939, and that the most important point in
16 concluding the Pact was to show a firm stand by
17 joining hands with other powers in face of the
18 threatening attitude of the United States, with the
19 ultimate aim of improving the Japanese-American rela-
20 tions.

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1 I now call the Court's attention to
2 prosecution's exhibit No. 552, transcript pages
3 6,350-6,378, Record of the Investigation Committee
4 of the Privy Council on the conclusion of the Tri-
5 Partite Pact, held on 26 September 1940. Foreign
6 Minister MATSUOKA explained in answering questions
7 by Councillors, among others, that (1) the aim of
8 the Pact is the prevention of war; (2) adjustment
9 of relations with Soviet Russia and the United
10 States was most eagerly sought for; and (3) Japan
11 can choose independently the time and place of
12 participating in the war if the obligation of
13 assistance (Article III of the Pact) should become
14 effective.

15 I now offer defense document 613, Interrogation
16 of late MATSUOKA, Yosuke, by the International
17 Prosecution Section at the Sugamo Prison, Tokyo,
18 for identification, and tender excerpts therefrom,
19 defense document 613-A(12) and 13 as evidence.

20 THE PRESIDENT: Mr. Comyns Carr.

21 MR. COMYNS CARR: May it please the Tribunal,
22 apart from the absence of the processed copies, the
23 other day when my friend was presenting part of the
24 Russian phase of the defense, he tendered an excerpt
25 from this interrogation of MATSUOKA's and I objected

1 to it successfully and the Court rejected it on the
2 ground that the prosecution had not used any part
3 of MATSUOKA's interrogation, and, therefore,
4 it was in no better position than any other self-
5 serving statement made after the event.

6 THE PRESIDENT: Well, MATSUOKA's position
7 is different. As I said before this afternoon,
8 that man is dead, and we cannot wait until he gives
9 the evidence as an individual.

10 MR. COMYNS CARR: That is no doubt true,
11 your Honor, but the Court rejected this other
12 excerpt from the same interrogation on the ground
13 which I am now putting. And, in my submission, a
14 mere statement made after the event cannot be
15 admissible whether the man is dead or alive, or
16 whether he was accused or whether he was not accused.

17 THE PRESIDENT: Not according to the rules
18 of evidence.

19 MR. COMYNS CARR: Now that he is no longer
20 here, he is in no different position from any other
21 person who might have happened to die during the
22 course of this trial and whom other defendants --
23 whose statements taken under those circumstances
24 other defendants wish to use on their behalf.
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THE PRESIDENT: Recess for fifteen minutes.

(Whereupon, at 1445, a recess
was taken until 1500, after which the proceed-
ings were resumed as follows:)

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1 MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: Mr. Cunningham.

4 MR. CUNNINGHAM: If your honor please, on
5 the first objection of the prosecution that they did
6 not introduce any excerpts from MATSUMOTO's interroga-
7 tion and therefore we should not, doesn't seem to hold
8 any water. If there was anything good in it they
9 probably would have introduced it, we can rest assured.

10 THE PRESIDENT: Well, we have discussed this
11 during the recess, Mr. Cunningham, and this is how we
12 view it.

13 MR. CUNNINGHAM: Well, I would like to give
14 my arguments.

15 THE PRESIDENT: Well, you can reply to this.

16 Well, I say this is my contribution and that
17 of two other members. We have decided to exclude
18 evidence -- statements made by any accused as against
19 other accused in answer to the prosecution offices
20 unless, of course, the other accused heard what was
21 said and accepted it as true. The prosecution invited
22 us to take that course and we did. We have taken it
23 in any event. Well, having excluded these interrogations
24 so far as they are adverse to other accused, are we to
25 admit them where they favor other accused? We decided

1 only the other day we would not. Are we to go back on
2 that decision?

3 MR. CUNNINGHAM: Well now, your Honors, on
4 that, if you are willing to go back to the beginning
5 of the prosecution's case and withdraw all the statements
6 of each of the defendants that were made against other
7 defendants and the interrogations against other defend-
8 ants, I say that is a good rule for us.

9 THE PRESIDENT: That is just what we did,
10 Mr. Cunningham. You must have forgotten.

11 MR. CUNNINGHAM: No, I haven't.

12 THE PRESIDENT: I am sure your colleagues can
13 assure you that we did that.

14 MR. CUNNINGHAM: That is my understanding that
15 the statements of the accused were not taken against
16 the other accused. I say that is good for us and I
17 wouldn't want you to go back on that. But all I am
18 arguing here is what MATSUOKA said about the Tri-Partite
19 Pact, the man who made it, probably should be admitted
20 here because I think it has weight, I think it has
21 relevancy and I think it would throw light on the
22 intention which Japan had in entering into the Tri-Partite
23 Pact.

24 THE PRESIDENT: Just as we admitted statements,
25 say, in correspondence by accused who were, say,

1 only the other day we would not. Are we to go back on
2 that decision?

3 MR. CUNNINGHAM: Well now, your Honors, on
4 that, if you are willing to go back to the beginning
5 of the prosecution's case and withdraw all the statement
6 of each of the defendants that were made against other
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19 Pact, the man who made it, probably should be admitted
20 here because I think it has weight, I think it has
21 relevancy and I think it would throw light on the
22 intention which Japan had in entering into the Tri-Parti-
23 Pact.

24 THE PRESIDENT: Just as we admitted statements,
25 say, in correspondence by accused who were, say,

1 foreign ministers.

2 But these interrogations, of course, are not
3 contemporaneous with the execution of the Tri-Partite
4 Pact but come in answer to the prosecution offices.
5 They are not explanatory of anything but exculpatory
6 of the particular accused who makes the statement. Of
7 course, what MATSUOKA wrote or said about the time of
8 the signing of the pact, and with a view to its execution,
9 would no doubt be material. We have admitted such
10 statements. But here is MATSUOKA saying something to
11 the prosecution offices in explanation of his conduct
12 or in exculpation of himself.

13 MR. CUNNINGHAM: Well, your Honor, on those
14 observations I would suggest that I can not draw the
15 line very distinctly between explanation and justifica-
16 tion. That is a little difficult for me.

17 Now on the second proposition what MATSUOKA
18 said in explanation of the Tri-Partite Pact is very
19 important when the prosecution is trying to read into
20 the Tri-Partite Pact something which is not there;
21 which is something they are trying to do. Now what is
22 the logical thing to do if a man writes an agreement and
23 you do not understand it or you see it is to be misunder-
24 stood; you say to that man, "what did you intend when
25 you made that agreement"? And that is what they said

1 to him on this occasion. And what he answers is very,
2 very important, especially, when you are trying to get
3 him to say something that he did not intend at the
4 time.

5 So that I say anything that MATSUOKA said
6 at any time about the explanation of the Tri-Partite
7 Pact would be important. When he said it, only goes
8 to the weight. That is my thought, your Honor, and,
9 if we are interpreting the Tri-Partite Pact, we need
10 the views of the men who wrote the pact.

11 THE PRESIDENT: Express contemporaneously,
12 certainly, however, we will consider this point,
13 Mr. Cunningham.

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1 MR. CUNNINGHAM: I pass to the next set of
2 documents. I will refer back, your Honor, in the
3 morning to this 613-A.

4 Next I want to call the witness MATSUMOTO,
5 Shumichi, Director of the Treaty Department of the
6 Foreign Office at the time of the conclusion of the
7 pact and thereafter. Affidavit No. 1547 is the docu-
8 ment.

9 THE PRESIDENT: Mr. Tavenner.

10 MR. TAVENNER: If the Tribunal please, the
11 prosecution would like to object to this affidavit
12 in its entirety and, therefore, we would like to present
13 it before taking up the time in calling the witness.
14 Paragraph 2 of this affidavit --

15 THE PRESIDENT: We haven't seen it.

16 MR. TAVENNER: I beg your pardon.

17 If the Tribunal please, in the last paragraph
18 of the paragraph marked No. 2, it is at the top of
19 page 2, the witness states the main purposes of the
20 Tri-Partite Pact, quoting the explanations of MATSUOKA
21 at the meeting of the Privy Council. The explanations
22 of MATSUOKA are in evidence as exhibit 552, transcript
23 page 6,350. This is the best evidence and we submit
24 that for that reason paragraph 2 is inadmissible.

25 THE PRESIDENT: Well, Mr. Cunningham could

1 agree to strike that out and substitute the reference
2 you gave.

3 MR. TAVENNER: That would solve the question
4 as to that paragraph. The rest of it is immaterial --
5 of that paragraph.

6 In Section 3 of the affidavit the witness
7 purports to construe the several articles of the pact.
8 The pact was introduced in evidence as exhibit 43 and
9 was read into the transcript at page 6,391. The
10 attempted construction by the witness of the provisions
11 of the pact is quite obviously an invasion of the duty
12 of the Tribunal, and the witness' opinion of the mean-
13 ing of the several articles and phrases is irrelevant.
14 This objection applies to subsections 3 to 6, inclusive,
15 under division 3 of the affidavit.

16 Section 4 of the affidavit recites the three
17 letters exchanged at the time of the signing of the
18 Tri-Partite Pact and purports to give a summary of
19 each. These three letters are in evidence: exhibit
20 555-B, transcript page 6,396; exhibit 555-C, transcript
21 page 6,400; and exhibit 556, transcript page 6,402.
22 These exhibits constitute the best evidence and we
23 submit that the summary of the contents of these letters
24 by the witness is of no probative value.

25 And, finally, we submit that the reference

1 of the witness, in subsection 3 of section 4 of the
2 affidavit, to an established theory of international
3 law is likewise quite irrelevant.

4 For the reasons mentioned, we object to the
5 introduction of the affidavit in its entirety.

6 THE PRESIDENT: Well, Mr. Tavenner, we notice
7 a reference, in paragraph 2 of section 3 on page 2, to
8 an exchange of letters in Tokyo on the day of the con-
9 clusion of the pact. Are those letters in evidence?

10 MR. TAVENNER: Yes, sir.

11 THE PRESIDENT: Do you know the numbers and
12 the page of the record?

13 MR. TAVENNER: They are the same documents
14 referred to as exhibits 555-B, 555-C and 556. The
15 page numbers --

16 THE PRESIDENT: The rest of the affidavit is
17 directed to showing the witness' qualifications, so if
18 you are right there is no need for this affidavit.

19 MR. CUNNINGHAM: Well, your Honor, if the
20 prosecution's theory of the case is right we don't
21 need any evidence either, but I contend that this
22 witness has to show very definite qualifications.
23 Being the legal adviser to the Foreign Minister of a
24 nation the size of Japan calls for qualifications.

25 THE PRESIDENT: But all he says in effect is

1 that certain documents passed between the parties.

2 MR. CUNNINGHAM: That is right, your Honor.
3 Now we get down to the basis of the thing. The whole
4 question in this cases, as far as the Tri-Partite Pact
5 is concerned, is what interpretation you, as Judges,
6 are going to place upon it. Now, if you only place
7 the interpretation of the pact which is connoted by
8 its phraseology, then I am satisfied; I don't have to
9 have any witnesses or documents to amplify their point
10 of view and other considerations which went into their
11 deliberations and the execution of the pact.

12 I have tried to give you what MATSUOKA con-
13 sidered in bringing about the pact and that has been
14 refused. My next best is to give you -- I meant taken
15 under advisement; I didn't mean that it had been refused.
16 But my next best evidence is to give you the legal
17 advice upon which MATSUOKA based his action.

18 Now, the prosecution has alleged that this
19 instrument was directed as an instrument of war to
20 secure the domination of the world, that it was one
21 of the elements of a conspiracy between these three
22 nations to combine their resources to that end. It is
23 our purpose to show that this pact meant nothing of
24 the kind, that it was a peace pact for the prevention of
25 further outspreading of the war. Those issues are sharply
joined.

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1 THE PRESIDENT: When a document consists of
2 simple words, the court has to construe. Sometimes it
3 contains technical words and the experts have to be
4 resorted to. As far as we know, this pact was couched
5 in simple language, German, I suppose, or Japanese.

6 MR. CUNNINGHAM: No, English.

7 THE PRESIDENT: English? Well, if it were in
8 English, that is all the more reason why we should
9 exclude the evidence of Japanese in the meaning of
10 English terms. We wouldn't allow our own foreign office
11 to tell us the meaning of an English treaty, or a
12 treaty in English terms; why fall back on the Japanese?

13 MR. CUNNINGHAM: Well, that is my theory,
14 your Honor, and my proof is directed to convince you
15 that the prosecution's theory of this is wrong; and
16 that is why I offer this witness, who knows what that
17 language meant because he approved of it.

18 THE PRESIDENT: If the language were ambiguous
19 or equivocal, we might have to fall back on his
20 assistance to elucidate it.

21 MR. CUNNINGHAM: I am corrected, here, that
22 the negotiations, as I understand it, were conducted
23 in English but the pact was finally reduced to the three
24 languages, Italian, German, and Japanese.

25 THE PRESIDENT: The English translation is not

1 challenged?

2 MR. TAVENNER: No, sir, the translation is
3 not challenged; and there was an English copy of the
4 text in the Japanese document that we introduced in
5 evidence. I believe that the original introduced was
6 the English copy.

7 MR. CUNNINGHAM: Your Honors, I believe it
8 will be helpful to listen to this witness. It is only
9 two pages long, and it certainly forms a basis of
10 Mr. Stahmer, young MATSUOKA, Prince KONOYE, all the
11 witnesses' testimony dovetailed into one theme.

12 THE PRESIDENT: We want and we need all the
13 help we can get, but we can't abdicate our functions.

14 MR. CUNNINGHAM: Well, your Honor, the
15 defendants are charged with conspiracy, with doing
16 something that was sinister, and I should like to have
17 you see this witness to see the type of man who
18 participated in the deliberations which went into this
19 document.

20 THE PRESIDENT: That is the most plaintive
21 argument I have ever heard: He couldn't have been
22 a conspirator -- look at him.

23 MR. CUNNINGHAM: May the witness be called?

24 THE PRESIDENT: By a majority, the Court
25 upholds the objection and rejects the testimony which

1 was about to be offered.

2 MR. CUNNINGHAM: I now call the Court's
3 attention to prosecution's exhibit No. 554, transcript
4 pages 6294 and 6295, the Imperial Rescript issued on
5 the day of the conclusion of the Tri-Partite Pact,
6 which shows most clearly and authoritatively the
7 peaceful intention of Japan.

8 I now offer in evidence defense document
9 No. 151--

10 THE PRESIDENT: Brigadier Nolan.

11 MR. CUNNINGHAM: I wasn't through with my
12 presentation, your Honor.

13 The text of the Treaty of Mutual Assistance
14 between Great Britain and Poland concluded on 25 August
15 1939, to show that more than one year prior to the
16 Tri-Partite Pact this Treaty of Mutual Assistance of
17 even stronger nature was concluded in another part of
18 the world, which fact throws much light on the
19 international situation of 1939 and 1940 as the back-
20 ground of the Tri-Partite Pact.

21 THE PRESIDENT: Brigadier Nolan.

22 BRIGADIER NOLAN: May it please the Tribunal,
23 this document, No. 151, and the succeeding document,
24 No. 150, were both offered in evidence before the
25 Tribunal and rejected. They were rejected at

1 pages 17,460 and 17,463. The basis of the objection
2 made at that time was that the documents themselves
3 were relevant to none of the issues in the case.

4 We submit that they are no more relevant now
5 than they were then.

6 MR. CUNNINGHAM: I submit that if the
7 prosecution agrees that the document, Tri-Partite Pact,
8 was a legal exercise of the sovereign right of Japan
9 in executing it, as this document was the legal right
10 of the sovereign nation of Poland and the other nations,
11 then there is no need for it.

12 THE PRESIDENT: Mr. Cunningham, did you know
13 that that document had been tendered before and rejected?

14 MR. CUNNINGHAM: No, I must confess that I
15 didn't; but it wouldn't make any difference, your
16 Honor, because it was offered for another purpose and
17 if it had been accepted then it would only be referred
18 to here. But I am offering it for a specific purpose
19 here, and I think it is relevant to the issue, and I
20 think it goes to sustain my view.

21 THE PRESIDENT: I am afraid that some of my
22 colleagues take an unfavorable view of your action in
23 this matter, in tendering again a document already
24 rejected without referring to the fact. None of my
25 colleagues wants to review his decision. The objection

is upheld and the document rejected.

1 MR. CUNNINGHAM: I should like to make offer
2 of the next document, 151. What the Tribunal does
3 with it, that is another problem. Of 150, I mean.
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5 I should like to make my offer of proof and
6 then it can be objected to, or whatever. I now offer
7 in evidence defense document No. 150, the text of the
8 Treaty of Mutual Assistance between Great Britain,
9 France and Turkey, concluded on 19 October 1939, to
10 show that as early as October 1939, a mutual assistance
11 treaty was concluded between belligerents and a
12 neutral country, as in the case of the Tri-Partite
13 Pact. This fact will also clarify the background of
14 the Tri-Partite Pact.
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1 THE PRESIDENT: Brigadier Nolan.

2 BRIGADIER NOLAN: May it please the Tribunal,
3 I would make, if I may, the same objection to this
4 document which was made to the immediately preceding
5 one. There is no difference or distinction between
6 them, and I submit that they are covered by the previous
7 ruling.

8 THE PRESIDENT: The objection is upheld and
9 the document rejected.

10 MR. CUNNINGHAM: I now offer in evidence
11 defense document 401 (33), an excerpt taken from
12 "Peace and War," to show the events which were occurring
13 simultaneously with the negotiation and conclusion of
14 the Tripartite Pact in September 1940, affecting the
15 situation of the world.

16 THE PRESIDENT: Mr. Tavenner.

17 MR. TAVENNER: If the Tribunal please, we do
18 not question the source of the document, but we object
19 on the ground that it is irrelevant.

20 I am confident in the course of the decision
21 on similar questions it has been announced that rela-
22 tions of that character were not in issue here, although
23 I do not have in mind the specific ruling of the Tribunal.
24 In any event, the matter is entirely irrelevant to any
25 issue involved in this case, and we object for that

reason.

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2 MR. CUNNINGHAM: If your Honor please, the
3 Tripartite Pact was made as it related to all the
4 events in international political, economic and mili-
5 tary situations, and it must be read in the light of
6 history which was going on at the time the pact was
7 executed. It is impossible to understand the pact as
8 of today without at least refreshing our memories on
9 the events which were taking place at the time the
10 pact was being executed and under the conditions which
11 were reflected in it.

12 THE PRESIDENT: By a majority, the Court
13 upholds the objection and rejects the document.

14 MR. CUNNINGHAM: I now offer a series of
15 documents in evidence in order to clarify the peaceful
16 intention of Japan in concluding the Tripartite Pact.
17 The first of these is defense document 155, message of
18 the Prime Minister dated 27 September 1940, which is
19 now offered in evidence, and simultaneously with the
20 conclusion of the pact this was made.
21

22 It is an excerpt from 777-A. I think it is an
23 excerpt from an exhibit. Anyway it is a message of a
24 Prime Minister.

25 THE PRESIDENT: KONOYE.

MR. CUNNINGHAM: Prince KONOYE.

1 THE PRESIDENT: Brigadier Nolan.

2 BRIGADIER NOLAN: If it please the Tribunal,
3 my document has at the top that it is an excerpt from
4 prosecution document No. 777-A.

5 MR. CUNNINGHAM: 777 -- no, it is a basic
6 document.

7 BRIGADIER NOLAN: If it is a basic document
8 it isn't an exhibit, it has only been marked for identi-
9 fication.

10 MR. CUNNINGHAM: Well, it is a speech -- we
11 can't be bothered with a technicality here -- it is a
12 speech of Prince KONOYE on the day the Tripartite Pact
13 was executed, and it ought to be read in evidence.

14 BRIGADIER NOLAN: Whether it has been in
15 before or not, your Honor, it merely goes over the old
16 ground again of the advisability of establishing a
17 new order in East Asia.

18 The document has no certificate attaching to
19 it, and it is a message, to whom I know not. There is
20 no line of it which contains anything of probative
21 value.

22 MR. CUNNINGHAM: The only question, your Honor,
23 is whether or not Prince KONOYE said it, and we contend
24 he said it. And if the prosecution can prove that he
25 didn't say it, why that maybe is some basis for objection.

1 It was marked for identification, as I
2 understand it, before, and this is just an excerpt.
3 But I am not sure about that. My colleague says he is
4 sure about it.

5 THE PRESIDENT: Only exhibits finally admitted
6 are lettered, and according to the defense this docu-
7 ment is already in evidence as exhibit No. 777-A.

8 MR. CUNNINGHAM: Well, just scratch off the
9 A, your Honor, and we will correct that and take it
10 as an excerpt from exhibit 777 for the time being,
11 and if that exhibit number is wrong, we will correct
12 it.

13 BRIGADIER NOLAN: May it please the Tribunal,
14 there is nothing wrong about the exhibit No. 777, I
15 suppose, but it is quite wrong to say that it is an
16 exhibit in the case. Exhibit 777 is a book from which
17 excerpts were taken. It has only been marked for
18 identification.

19 MR. CUNNINGHAM: Mr. USHIBA says that that is
20 a correct statement of the record.

21 THE PRESIDENT: The objection is overruled
22 and the document admitted for what it is worth, by a
23 majority.

24 CLERK OF THE COURT: Defense document 155
25 will receive exhibit No. 2734.

(Whereupon, the document above
referred to was marked defense exhibit
No. 2734 and received in evidence.)

MR. CUNNINGHAM: (Reading) "Message of the
Prime Minister."

"On the occasion of the conclusion of the
Three-Power Pact between Japan, Germany and Italy, an
Imperial Rescript has been issued, setting forth clearly
the aims of our Empire and pointing the path our nation
should follow. I am greatly moved by the boundless
benevolence of our Sovereign.

"To maintain world peace and to insure the
stability of East Asia is indeed the immutable national
policy of Japan, firmly rooted in the principle on which
our Empire was founded.

"With war breaking out in Europe last autumn,
conflict and confusion have spread increasingly over
the world. It is an urgent necessity of this moment
to devise a measure for the cessation of the disturb-
ances and the restoration of peace. Germany and Italy
share with our Empire in the same ideal and aspirations.
Accordingly, with a view to joining hands with these
Powers to establish a new order in the respective regions,
and furthermore to cooperate with them toward the
restoration of world peace, Japan has now concluded a

1 Three-Power Pact. The time has come for our nation to
2 proceed with fresh resolve to construct a new order
3 in Greater East Asia.

4 "However, to carry out fully the conviction
5 of our country and to enable all nations to find each
6 its proper place is indeed a difficult task. The
7 goal lies far. We must expect to encounter numerous
8 obstacles as we go on.

9 "I confidently hope that, in obedience to the
10 Imperial will, our people, in order to surmount the
11 present emergency, will make clear the concept of our
12 national policy, unite heart and soul, and overcome
13 any and every obstacle -- and thereby set at ease
14 the august mind of our Sovereign.

15 "27 September 1940.

16 "Prime Minister, Prince KONOYE"

17 THE PRESIDENT: We will adjourn now until
18 half past nine tomorrow morning.

19 (Whereupon, at 1600, an adjournment
20 was taken until Friday, 13 June 1947, at
21 0930.)
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